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NEIL BATTERLEE and
CHARLES L. BINNS, doing
business as Batterlee
& Binns,

Appellees,

v.

WILLARD C. LINDSAY,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

242 I.A. 638

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$377.50, rendered against defendant in a 4th class ^{action} in contract, tried before the court without a jury.

In the fall of 1922, plaintiffs, as court reporters, were engaged in reporting on behalf of the Government the case of United States v. Railway Employees, and defendant, also a court reporter, had been employed to report the same case on behalf of the defendants. It was agreed verbally that plaintiffs would furnish to defendant a carbon copy of the transcript of the proceedings, and 4651 carbon pages in the aggregate were furnished to defendant from time to time. Plaintiffs claimed that the agreement was that a charge of 25 cents per page would be made to defendant. He, on the contrary, claimed that at the time the arrangement was made nothing was said concerning a specific charge per page, but that it was understood that he would pay the usual and customary charge, as then obtained between court reporters in Chicago, which, as the evidence showed, was from 10 to 15 cents per carbon page, and never in excess of 15 cents. Defendant made two payments by check to plaintiffs - one on October 12, 1922, for \$500, and the other on December 11, 1922, for \$200 - and he contended that by these payments plaintiffs' claim for said carbon pages furnished, at the usual rate of 15 cents per page, had been paid in full. In plain-

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tiffs' amended affidavit of claim the balance claimed to be due to them, after allowing credit for said two payments and certain other items, was \$399.02. Defendant had filed a set off, claiming a net balance due him of \$91.39. The court found, under all the evidence introduced, that, although the price of 25 cents per carbon page "seemed high," plaintiffs were entitled to recover on that basis because, apparently, defendant definitely had agreed to pay at that rate per page and, after allowing some of the items contained in defendant's claim of set off, assessed plaintiffs' damages at the sum of \$377.50.

During the trial, while plaintiffs' witness, Charles A. Boes, also a court reporter and with office located in the same building as plaintiffs', was testifying, it appeared for the first time that Boes had a relation, like that of a partner, with plaintiffs in the work of reporting cases in the Federal Courts at Chicago on behalf of the Government, and that properly, in the present action, he should have been joined as a party plaintiff with Batterlee & Binns. He testified: "We are both interested in this work. We each - I personally and Batterlee & Binns together, have a half interest in this Federal reporting work. * * I was interested to the extent of one-half of the profit in this case; that is, not only this case, but the general run of the work down there." Before the entry of the judgment in the present case defendant's attorney objected to any judgment against defendant on the ground that there was a non-joinder of parties plaintiff, but the court overruled the objection and also overruled defendant's motions for a new trial and in arrest of judgment.

We are of the opinion that there is a fatal non-joinder of parties plaintiff in the present action in contract, and that for this reason this judgment must be reversed and the cause remanded. (Dinet v. Reilly, 2 Ill. App. 316, 320; Snell v. Deland,

43 Ill. 323, 325; Dement v. Rokker, 126 Id. 174, 191; Starrett v. Saul, 165 Id. 99, 101.) In the Snell case it is said: "It is a rule as old as the science of pleading itself, that in declaring in actions on contracts there must not be too few or too many plaintiffs. If there be, it is fatal to recovery, - the action must fail and this objection can be availed of, either by plea in abatement or as a ground of non-suit on the trial upon the plea of the general issue." In the Dinet case it is said: "The general rule is, that the omission of proper parties as plaintiffs in actions upon contracts, may be taken advantage of at the trial under the general issue, or on motion in arrest of judgment, or on error." Furthermore, on the merits, we are not satisfied that the trial court was warranted from the evidence in rendering the finding that was rendered, and we think that it would be in the interests of justice that a new trial be had after proper amendments as to parties plaintiff are made.

For the reasons indicated the judgment of the Municipal court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Fitch and Barnes, JJ., concur.

CHRIST TOKICH,
Appellee,

v.

YELLOW CAB COMPANY,
a corporation,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

242 I.A. 638

MR. PRESIDING JUSTICE CRIBLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$17,500, entered June 20, 1925, against the Yellow Cab Company, in an action against it and one E. J. Finn for personal injuries received by plaintiff, occasioned by a yellow cab, in which he was a passenger, colliding with Finn's automobile. The jury found the Cab Company guilty and assessed plaintiff's damages at \$17,500. Finn was found not guilty. The collision occurred on a clear day at or near the intersection of California and West 31st boulevards in Chicago, about 2:30 o'clock p. m., July 1, 1923.

There were three counts in plaintiff's declaration to which defendants filed separate pleas of the general issue. The first two counts in slightly different language charged defendants generally with negligence in the operation of their respective automobiles. The third count charged negligence in operation, in that they were driven, in a residential district in an incorporated city, at a speed in excess of 15 miles per hour, and at a greater speed than was reasonable and proper, etc., in violation of the statute.

California boulevard runs north and south and West 31st boulevard runs east and west, but they do not cross. The west end of the latter connects by a curve with the south end of the former, forming a continuous boulevard which is 50 feet wide from

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curb to curb. Shortly before the collision the yellow cab was moving south, approaching the curve, along the west side of California boulevard, in line with a number of other automobiles also moving south; and Finn's automobile, a Buick sedan, was moving west, approaching the curve, on the north side of West 31st boulevard. At some point, north of the curve, the left front fender and bumper of the sedan car collided with the left rear fender and left rear wheel of the cab, causing the cab to tip over on its side and causing serious and permanent injuries to plaintiff's left hand. There were seven persons in the cab at the time, - the chauffeur, plaintiff and members of his family, and some friends. Only plaintiff and the chauffeur testified. Plaintiff did not know the cause of the collision. He was sitting inside the cab, with his back to the front, talking with the other occupants. Finn, the owner and driver of the sedan car, had four guests with him, 4 his daughter, Belle, about 15 years old, another young lady, Miss Hogan, and two nuns, Sister Mary Nicholai and Sister Forencia. All were called as plaintiff's witnesses, as were others. At the conclusion of plaintiff's evidence, Finn and said guests, except Miss Hogan, were called as witnesses for him, and each gave further testimony. The Cab Company called no witnesses, possibly because all of the witnesses upon whom it relied for the presentation of its defense of want of negligence had been called by plaintiff.

Upon the trial it was conceded, practically, by both defendants that plaintiff was not guilty of any negligence which contributed to his injuries. Each defendant sought to show, by cross-examination of plaintiff's witnesses, that the collision was caused by the negligence of the driver of the other automobile, in allowing it to get beyond the center line of the curved boulevard, - in other words, on the wrong side of the road. Plaintiff's attorney adopted the somewhat unusual tactics of calling as plaintiff's witnesses many, if not all, of the persons who were

in court under subpoena by, or at the request of, one or the other of the defendants. Under well established rules of evidence plaintiff could not question the credibility or trustworthiness of any witness called by him, or impeach such a witness by any of the usual methods, and during the trial plaintiff made no attempt to do so. But it is also a rule of evidence that a party to a litigation may show the truth "by any competent testimony, even in direct contradiction of what" any witness called by such party "may have testified to." (Luthy & Co. v. Paradis, 299 Ill. 380, 383.) It is said in People v. Johnson, 314 Ill. 486, 493: "This guaranty of credibility, if we may call it such, relates to the witness' general trustworthiness and not to the correctness of specific statements of fact."

After plaintiff had called defendant Finn, and then successively all of the guests in his car, he called Mr. and Mrs. Smedley and afterwards Janousek, the chauffeur of the cab, and then six other occurrence witnesses.

Finn testified in substance that he had driven his car every day for about four months prior to the accident; that as he was rounding or had rounded the curve to the right of the center line thereof, at a speed of about 12 miles per hour, and was proceeding in a northerly direction on the east side of the boulevard, he noticed the cab, running at a speed of about 20 miles per hour and being "about 10 feet east of the middle of the drive," coming right at him; that the collision occurred almost immediately, and as a result the cab swerved towards the southwest, turned over on its side and slid along the pavement, coming to a stop "about 10 or 15 feet east of the west curb and about even with the north curb (extended) of 31st boulevard;" and that the witness' car did not tip over but came to a stop, with its steering gear out of commission, and it was later pushed over by some bystanders to the west side of California boulevard. The testimony of his four

guests tended to corroborate him on material points, and particularly that at the time of the collision his car was east of the center line of California boulevard, and moving northerly. Mr. J. O. Smedley, who with his wife just prior to the collision was travelling in an automobile south in California boulevard behind the yellow cab, testified that the cab "left the line of machines it was travelling in," and "cut across to the east side" of the boulevard; that when the collision occurred it was going between 20 and 25 miles per hour; that "it was knocked several feet west," and "turned over and slid," and "when it finally came to rest it was about four feet from the west curb;" and that "there were scratches on the paving, marks where it skidded, which extended from the east side of the street over to where the cab stopped." Mrs. Smedley's testimony corroborated that of her husband, especially as regards the collision occurring east of the center of California boulevard and as regards the marks of the pavement, which she testified were "continuous" and "began on the east side of the street and ended where the cab was lying over on its side."

The testimony of the chauffeur of the cab, Janousek, was to the effect that he was an experienced driver; that just prior to the collision he was approaching the curve from the north, moving at a speed of from 12 to 15 miles per hour; that as he was about to make the turn he "noticed another car, passing a car going in the opposite direction, coming at me;" that he "tried to apply his brakes and stop, but this car struck my rear left fender and tipped my cab over;" and that "the collision took place in my right half on the street, - the other car came over on my half of the street about 10 feet, - he was 10 feet past the center of the street when the collision occurred." The testimony of the six other occurrence witnesses, who followed Janousek on the stand, tended to corroborate his version of the happening

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of the accident and to show that Finn's car was moving northerly on the wrong side of the street at the time.

From the foregoing conflicting testimony and all the facts and circumstances in evidence, we think it was peculiarly within the province of the jury to determine which one of the defendants, if not both, was guilty of negligence proximately causing the collision and plaintiff's resulting injuries, and that there is no merit in appellant's counsels' main contention that the jury's verdict, finding the Cab Company guilty as charged, is manifestly against the weight of the evidence.

Appellant's counsel complain of two given instructions, one, No. 4, offered by plaintiff, and the other, No. 25, offered by defendant Finn. No. 4 is as follows:

"The court instructs the jury that while, as a matter of law, the burden of proof is upon the plaintiff and it is for him to prove his case by a preponderance of the evidence, still if the jury find that the evidence bearing upon the plaintiff's case preponderates in his favor but slightly, it will be sufficient for the jury to find the issues in his favor."

Although instructions in substantially the same form, where there was one defendant, have been approved in Taylor v. Felsing, 164 Ill. 331, 336; Donley v. Dougherty, 174 Ill. 582, 583, and Chicago City Ry. Co. v. Nelson, 215 Ill. 436, 443, yet counsel contend that in a case that where there are two defendants the instruction is misleading. The argument is that plaintiff's "case" consists of proof of due care on his part and negligence on the part of one or both of the defendants; and that the instruction fails to differentiate between the defendants, and does not require that the jury find such preponderance "against the particular defendant against whom the verdict is returned." We cannot agree with the contention and do not think the trial court erred in giving the instruction. The jury could not have been misled by it, especially in view of other given instructions asked by each defendant. At the request of the Cab Company the court gave an

instruction (No. 5) that the burden was upon the plaintiff to prove that it (the Cab Company) was guilty of the negligence charged against it, and in given instruction No. 17, requested by Finn, the jury were told that each defendant had the right under the law to have his defense considered separately as though he was the only defendant. The instruction complained of is not mandatory, or one which "directs a verdict," but it merely defines the extent of the required preponderance of the evidence. (Waiswila v. Illinois Central R. Co., 230 Ill. App. 113, 120.)

Given instruction No. 25, complained of, is as follows:

"You are further instructed that the defendant, Finn, was not required by law to guard against unusual or extraordinary conduct of others on the public highway, which could not have been anticipated or guarded against by him in the exercise of ordinary care, and if you believe from the preponderance of the evidence under the instructions of the court that the manner in which the taxicab of the defendant, Yellow Cab Co., was operated on the occasion in question was unusual and extraordinary, and that it could not have been anticipated or guarded against by the defendant, Finn, by the exercise of ordinary care on his part, then you should find the defendant, Finn, not guilty."

Counsel contend that this instruction is so prejudicial to the Cab Company that error may be predicated thereon on appeal, even though it was not requested by plaintiff. (Citing MacDonald v. Chicago Rys. Co., 286 Ill. 239, 241.) Counsel argue in substance that, inasmuch as neither defendant claimed that plaintiff was guilty of any contributory negligence and the jury naturally would think that negligence of one or the other defendant caused the accident, the instruction "shifted the responsibility for the accident" to the Cab Company; that, inasmuch as the instruction directed a verdict in favor of Finn, it in effect directed a verdict against the Cab Company without containing necessary elements; that it did not require the jury, before reaching the verdict as directed, to find that the unusual and extraordinary manner in which the cab was operated proximately caused the collision; and that it did not require the jury to find that the accident was not proximately caused by Finn's negligence independent of the manner

in which the cab was being operated at the time. In view of the evidence and of other given instructions we do not think that the error, if any there be, in the instruction is such as requires a reversal of the judgment. The jury could not have been misled by it. The only unusual and extraordinary conduct on the part of the chauffeur of the cab was, his driving suddenly on the east, or wrong, side of the boulevard, as numerous witnesses testified; and the main issue of fact in the case was, which car at the time of the collision was negligently traveling on the wrong side of the boulevard. If the jury believed that the cab was, that fact, under the evidence, was a sufficient proximate cause for the collision, and the failure to incorporate into the instruction the elements referred to by counsel could not be prejudicial to the Cab Company. Furthermore, among the series of instructions, the court, at its request, gave instruction No. 8. It is of the same general import as No. 25; it directs a verdict for the Cab Company; it tends to "shift the responsibility" for the accident to the defendant, Finn; and substantially the same elements are lacking therein as are claimed by counsel to be lacking in instruction No. 25. Furthermore, instruction No. 25 did not direct a verdict against the Cab Company, and it is very different from the one in the MacDonald case, supra, which was held to be "palpably erroneous."

Counsel further contend that the damages of \$17,500 are excessive, and that probably the amount of the verdict was enhanced by the court erroneously admitting in evidence certain testimony of plaintiff's witness, Dr. Finberg, and improperly allowing plaintiff to exhibit his injured hand to the jury.

Dr. Drury, house physician at the hospital to which plaintiff was taken immediately after the accident, testified that there was a large laceration on the top of plaintiff's left hand,

through which two bones were protruding; that there was a compound comminuted fracture of the 4th and 5th metacarpal bones, extending from the little and ring fingers to the wrist; that notwithstanding precautions taken infection set in with constant discharge of pus; that plaintiff remained at the hospital for two weeks and afterwards returned for daily treatments for several weeks; and that when the witness last saw him the wound still was discharging pus.

Dr. Finberg testified that he treated plaintiff's hand practically every day from August 17, 1923, to about the middle of January, 1924; that he found that the hand "was in an infected suppurating condition;" that "he opened the lacerations, removed part of the bone, straightened it and put it in proper place, and kept dressing the wound daily, * * striving to get the infection out," which he was unable to do; that plaintiff carried a temperature all the time and suffered much pain; and that he again saw him during the trial in June, 1925, when he examined him for the purpose of testifying as to his then condition. The witness was asked what "objective symptoms" he then found, and replied, over objection: "There was no motion of any finger except the thumb, and that very little; the four fingers were limp; the 4th and 5th metacarpal bones have been removed and the extensor muscles of the tendons have been cut; there is no motion in the fingers at all, as there is nothing to make motion with; and all the muscles have either rotted away or been removed." The witness was then asked to give his opinion as to whether plaintiff would "ever be able to do any useful work with that hand," and, over objection of attorney for the Cab Company, on the ground that an answer to the question would be putting the witness "in the place of the court and jury," was allowed to reply, and did reply: "He will never be able to use it."

Dr. Magnuson testified in substance that when he first saw plaintiff in January, 1924, he found an infection in the 4th and 5th metacarpal bones of plaintiff's left hand, from which pus was discharging; that he removed the bones down to the wrist; that the tendons of the ring and little fingers had sloughed away, and the other tendons, controlling the index and middle fingers, were struck tight to the bone and the other tissues around it; that under anesthesia said other tendons could not be moved; that while plaintiff was under the anesthetic "there was no chance of his fooling me;" that "he had only about 5 or 10 degrees of motion that could be produced in the wrist under anesthesia;" that he left the hospital on January 24, 1924, but the witness continued to treat him frequently for several weeks thereafter and succeeded in causing a slight improvement in the movements of the hand; and that when his treatments ceased plaintiff "had in the index and middle fingers about 20 degrees of motion at the base phalanges, where the fingers join the hand, and very slight motion of the middle and end joints, which motion was limited by the adhesions of the tendons in the back of the hand, but the wrist joint was beginning to move considerably better, there being about 35% of motion there under force of the examiner." The witness examined plaintiff during the trial in June, 1925, and stated in part:

"The condition now is that there is a scar on the outside of the hand, between the base of the little finger and the wrist. The little and ring fingers are entirely useless. There is no control in them because there is no tendon in the back of the hand to control them and there are no bones for them to move against. There is no leverage. * * As to the middle and index fingers he has flexion amounting to about 90 degrees at the base phalanx, i. e. the joint between the fingers and the hand. Passively, that is with force by the examiner, the fingers can be moved down at the middle and end joints to about 75 or 80 degrees in the middle joint and about 45 degrees in the end joint. I examined him by controlling or putting my hand on the muscles which control the flexion and extension of those fingers, and one can tell in that way whether the patient is resisting one group of muscles with another, and thereby limiting motion. * * He can pick things up between those two fingers (index and middle) and thumb, but he cannot

bring the fingers down into the palm of the hand. The strength of the hand is very small. * * I think he has reached the limit of his improvement."

Plaintiff, 28 years of age at the time of the accident, testified (through an interpreter) that he was a common laborer, usually in the work of constructing buildings, and never had any other occupation; that for the preceding year he had worked constantly and had made on the average about \$50 per week for the entire year; that just before the accident he had been working for a building contracting firm, in a wrecking gang, carrying 16 foot planks; that he has never gone to school; that after the accident he was taken to a hospital and there given treatments for two weeks; that subsequently he was treated successively by three physicians, being under the care of one (Dr. Wieland who did not testify) for about three weeks, of another, Dr. Finberg, for about five months, and of a third, Dr. Magnuson, for about 14 weeks; that during the times of these treatments he suffered great pain and lost much sleep; that he has since tried to work at his usual occupation, which requires the use of both hands, but finds that he "can't work;" that he has not earned any money since the accident, and that he owes said physicians for their services, not having the money to pay them. It appears from the evidence that the reasonable and customary charge for Dr. Finberg's services is \$578, and for Dr. Magnuson's services \$500. Plaintiff was asked on direct examination as to the condition of his hand with reference to whether he could use it, and he replied, over objection: "I can move two fingers a little; I can't bend even them." Upon being asked what part of the hand he could move he replied that he wanted to show his hand to the jury. Counsel for the Cab Company objected to his doing this, as Dr. Magnuson had described the condition of the hand fully. But the court overruled the objection and plaintiff, after being cautioned by his attorney "not to talk and not to make any demonstration with the hand" but to "turn it all around,"

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

But the court overruled the objection and admitted the evidence. The court then said that the evidence was competent and relevant to the issue of the defendant's sanity at the time of the crime. The court then found the defendant guilty of the crime and sentenced him to the state prison for a term of years.

exhibited his hand to the jury.

After a careful review of the evidence as to plaintiff's pain and suffering, the permanent injury to his left hand, its present condition, his inability to work at the only occupation to which he has been accustomed, and the expense, amounting to more than \$1,000, he has contracted for medical services in treatments on the hand, we are unable to say that the verdict, though large, is excessive, particularly when consideration is given to the decreased value of the dollar in its present purchasing power. Plaintiff is a building laborer and he is uneducated - never having gone to school. His occupation as a laborer is the only one he has for making a livelihood for himself and family. In that occupation he is required to use both hands and the evidence is uncontradicted that the present strength of the injured hand is slight, and in its use he is limited to picking things up between the thumb and index and middle fingers. It is apparent that he will not be able to again work as a building laborer and command anywhere near the amount of wages which he earned prior to the accident in which he was injured through no fault of his own. And we do not think that the trial court, in allowing Dr. Finberg to give the testimony he did as above outlined, and of which counsel for the Cab Company strenuously complains, or in allowing plaintiff to exhibit his hand to the jury, committed any errors, if errors there were, which require a reversal of the judgment and a new trial to be had. As to Dr. Finberg's testimony it was based on objective and not subjective symptoms. It is apparent from his testimony, and that of Dr. Magnuson (of which no complaint is made,) that the condition and lack of motion in the hand could not be simulated by plaintiff. And we think, under the facts in evidence, Dr. Finberg was entitled as an expert to give the opinion he did as to plaintiff's ability

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to use his hand in the future. As to plaintiff exhibiting his hand to the jury it does not appear that while doing so he made any attempt, being cautioned by his attorney in this particular, to move the fingers of the hand or to suppress their motion.

For the reasons indicated we are of the opinion that the judgment of the Superior court should be affirmed and it is so ordered.

AFFIRMED.

Fitch and Barnes, JJ., concur.

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

MICHAEL HEITLER and HENRY KIMEL,
Plaintiffs in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

242 I.A. 638

MR. PRESIDING JUSTICE GRIDLEY

DELIVERED THE OPINION OF THE COURT.

On June 19, 1925, an indictment consisting of two counts was returned against Michael Heitler and Henry Kimel. In the first they were charged with unlawfully keeping and maintaining, in said Cook County, on June 15, 1925, "a certain common gaming house for gain and lucre," and in the second they were charged with then and there "unlawfully and wilfully keeping, operating, owning and using a certain slot machine ** being a device upon which money is staked and hazarded, and into which money was put and played upon chance," etc. Each defendant filed a plea of not guilty, and on October 23, 1925, after waiver of jury trial, evidence was heard before the court, resulting in the court finding each defendant guilty. After motions for a new trial and in arrest of judgment had been over-ruled each was adjudged guilty of "keeping a common gaming house in manner and form as charged in the indictment," and each sentenced to the House of Correction for 30 days and also to pay a fine of \$100.

After reviewing the evidence we are of the opinion that, while there is some testimony that on the date mentioned there was a slot machine upon the premises, viz., the Burr Oak Hotel at Burr Oak in said County, which hotel was operated by the defendants, there was no sufficient evidence to warrant the judgment that they were then and there "keeping a common gaming house."

Furthermore, as admitted by counsel for the People, there was no evidence that the offense, as adjudged, was a second offense, and under the provision of the statute the court was not warranted in sentencing either defendant to the House of Correction. For a first offense under the statute (Cahill's Stat. 1925, chap. 38, page 872, par. 305) only a fine "not less than \$100" may be imposed.

For the reasons indicated the judgment against the defendants is reversed.

REVERSED.

Fitch and Barnes, JJ., concur.

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

MICHAEL HEITLER and HENRY KIMEL,
Plaintiffs in Error.

242 I.A. 639

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

632 I.A. 639

MR. PRESIDING JUSTICE GRIDLEY

DELIVERED THE OPINION OF THE COURT.

On June 19, 1925, an indictment was returned against Michael Heitler and Henry Kimel, case No. 37169, charging them in substance with keeping and maintaining in said County, on June 15, 1925, a common, ill-governed and disorderly house, where fornication and prostitution are practiced. They filed separate pleas of not guilty and waived trial by jury. On June 26, 1925, another indictment was returned against them, case No. 37232, also charging them with keeping and maintaining, in said County, on June 20, 1925, a disorderly house. About June 19, 1925, an indictment also was returned against certain inmates of the same house, and the present transcript discloses that all of said indictments by agreement were tried at the same time before the court without a jury in October, 1925. As one of the results of the trial Heitler and Kimel were found guilty in case No. 37169, and on October 23, 1925, each was adjudged guilty of keeping a disorderly house in manner and form as charged in the indictment and each was sentenced to 30 days in the House of Correction and to pay a fine of \$100.

It appears from the evidence that very early in the morning of June 15, 1925, shortly after midnight, several police officers went to the Burr Oak Hotel at Burr Oak, Cook County, Illinois, to make what is commonly known as a raid. Three of these officers were called as witnesses for the People and they testified

at length as to what they saw and did at the time of their visit. Certain inmates of the hotel at the time also testified. The defendants did not testify.

The main contention of counsel for defendants is that the evidence does not show beyond a reasonable doubt that defendants at the time and place in question were keeping and maintaining a disorderly house, as mentioned in section 57 of the Criminal Code (Cahill's Stat. 1925, chap. 38, page 853, par. 145). We have reviewed the evidence and are of the opinion that there is no merit in the contention. We think it sufficiently appears from all the facts and circumstances disclosed that at said time the hotel was a place or house where fornication and other like misbehavior were practiced commonly and at frequent intervals, and that defendants were then the keepers and managers of the hotel, and that they knowingly permitted the unlawful practices and misbehavior mentioned. The statute referred to provides that whoever keeps or maintains such a disorderly house "shall be fined not exceeding \$200, or imprisoned in the county jail or house of correction for a period of not more than one year, or both." The sentence of each defendant is within the statute. Accordingly the several judgments against the defendants are affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

The People of the State of Illinois, defendant in error, v. Michael
Heitler and Henry Kimel, plaintiffs in error. Gen. No. 30,895.

242 I.A. 639

4 Prosecution for keeping house of ill-fame. Judgment of con-
viction.

Error to the Municipal Court of Chicago;
Appeal from the Superior Court of Cook county;
Circuit Court of county;
County Court of county;
the Hon. , Judge, presiding. Heard
in the division of at the term,
this court
Affirmed
Reversed
Reversed and remanded with directions.
Opinion filed Rehearing denied

Consol
note
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for appellants.

for plaintiffs in error.

for appellees.

for defendants in error.

MR. PRESIDING JUSTICE

delivered the opinion of the court.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

MICHAEL HEITLER and HENRY KIMEL,
Plaintiffs in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

242 I.A. 639

MR. PRESIDING JUSTICE GRIDLEY

DELIVERED THE OPINION OF THE COURT.

On June 26, 1925, an indictment was returned against Michael Heitler and Henry Kimel, case No. 37232, charging them in substance with keeping and maintaining, in said County, on June 20, 1925, a common, ill-governed and disorderly house, where fornication and prostitution are practiced. They filed separate pleas of not guilty and waived trial by jury. Previously, on June 19, 1925, another indictment, case No. 37169, had been returned against them charging them with keeping and maintaining, in said County, on June 15, 1925, a disorderly house. About the same time an indictment also was returned against certain inmates of the same house, and the present transcript discloses that all of said indictments by agreement were tried at the same time in October, 1925, before the court without a jury. In the particular case against Heitler and Kimel, involved in the present writ of error, each of them was found guilty, and on October 23, 1925, after motions for a new trial and in arrest of judgment had been over-ruled, each was adjudged guilty of keeping a disorderly house in manner and form as charged in the indictment, case No. 37232, and each was sentenced to 30 days in the House of Correction and to pay a fine of \$100.

The main contention of counsel for defendants is that the evidence does not show beyond a reasonable doubt that defendants, or either of them, at the time and place in question, were keeping

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and maintaining a disorderly house, as defined in section 57 of the Criminal Code. (Cahill's Stat. 1925, chap. 38, page 853, par. 145.) We cannot agree with the contention. On the trial, after certain police officers had given their testimony as to what they saw and did at the time of a certain raid made by them early in the morning of June 15, 1925, at the house in question, known as the Burr Oak Hotel at Burr Oak, Cook County, Illinois, three other police officers, connected with the office of the State's attorney, testified at length as to what they saw and did on the occasion of another raid made by them at said hotel about 10:30 o'clock in the evening of June 20, 1925. Several of the then inmates of the hotel also testified. Heitler and Kimel did not testify. No useful purpose will be served in detailing the testimony. Suffice it to say that we have reviewed it and are of the opinion, from all the facts and circumstances disclosed, that on June 20, 1925, the hotel was a place or house where fornication and other like misbehavior were practiced commonly and at frequent intervals, that it was a disorderly house as defined in the statute, that defendants were then the keepers and managers of the same, and knowingly permitted the said practices and misbehavior, and that the court was amply justified in entering the finding and judgment complained of. The sentences against the defendants are in accordance with the provisions of the statute. Accordingly, the several judgments against them are affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

Journal of Management Education, 27(8), 960-977.

EDWARD P. McMULLEN,
Plaintiff in Error.

Y3.

ILLINOIS CENTRAL RAILROAD CO.,
Defendant in Error.

WIRCA TO SUPREME COURT

OF COOK COUNTY.

242 I.A. 639

MR. PRESIDING JUSTICE GRIDLEY

DELIVERED THE OPINION OF THE COURT.

On a second trial of an action for damages for personal injuries the jury returned a verdict finding defendant not guilty, and on February 7, 1925, after plaintiff's motion for a new trial had been over-ruled, the court entered judgment against him for costs, which judgment it is sought by this writ of error to reverse.

The accident occurred on February 13, 1922, about 1:30 o'clock in the afternoon. Plaintiff, about 18 years of age, was driving a motor truck of his employer, Wagner-Winelow Co., westward over a planked roadway which ran in a general easterly and westerly direction and which crossed about 20 of defendant's railroad tracks, running in a northerly and southerly direction. As he reached the third track from the west one of defendant's engines, backing northward, collided with the truck and as a result his left foot and leg were so severely injured that it became necessary to amputate the leg above the ankle. The roadway was about opposite 15th street and about two blocks south of the south end of defendant's main passenger station in Chicago. Its west end was connected by another roadway with Indiana Avenue, which is west of the west line of defendant's right-of-way and about parallel therewith. There was an elevated structure, containing two tracks, which crossed over the roadway and some of the tracks. The track on which the collision occurred is

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immediately west of the elevated structure and is practically on level ground where the roadway crosses it and for about 60 feet south, but from there it runs up hill, curving towards the southwest until it reaches the top of the elevated structure at about Indiana avenue. Because of obstructions to the view of the operators of defendant's engines, as well as of persons traveling over the roadway in vehicles or on foot, caused by certain pillars, abutments, buildings, etc., the crossing at the place of the collision and at other places, was a dangerous one. Defendant did not maintain a flagman at the crossing. The more westerly of the 20 tracks were so-called "main" tracks, then came the tracks used for suburban trains, and then, still farther east, were about 12 tracks on which Pullman sleeping cars, dining cars, etc., were stored temporarily between trips. Plaintiff's employer, Wagner-Winslow Co., dealt in meats and other provisions and was accustomed to furnish such supplies for defendant and the Michigan Central and Big Four railroad companies at their dining cars thus stored. The roadway was a private one, located entirely upon defendant's property, and was used chiefly by defendant's employees, going to and from their work, and by those firms and persons who delivered such supplies. Plaintiff had crossed over the roadway with the truck and had delivered for his employer certain supplies to a Michigan Central dining car. It was on his return trip over the roadway that the collision occurred. He was sitting on the left side of the driver's cab, driving the empty truck, and a companion named Malette was seated at his right. Plaintiff was familiar with the roadway, the tracks, and the general situation. He had been making similar deliveries to dining cars on the average of seven times a week for nine preceding months. He knew that trains and engines crossed the roadway at frequent intervals, that no flagman was stationed at the crossing, and that there were no mechanical

devices giving warning of a train's approach. As he proceeded westward he says he looked both to the north and to the south and did not see any approaching train. No train was approaching from the north, and only the said engine was approaching from the south. And the evidence further discloses that the sun was shining; that there was no smoke to impair his vision and no other vehicles on the roadway to distract his attention; that had he looked to the south when he was about 17 feet from the track on which said engine was approaching, he could have seen it, as at such point there was an unobstructed view of the track for a distance of about 450 feet; and that, had he looked at other times to the south during his advance westward, he could have seen it. He further testified that he did not again look to the south until he was about 10 or 12 feet from the track; that he then saw the engine for the first time a short distance away, and that he applied his brakes but was unable to stop his truck in time to avoid the collision. On the questions of the speed of the truck and the speed of the engine, and whether or not the bell of the engine was then being rung, the evidence is conflicting.

Plaintiff's declaration, filed June 15, 1922, consisted of two counts. The first was predicated solely upon defendant's alleged negligence in failing to maintain a flagman at the crossing, and the second solely upon the alleged negligence of the crew operating the engine. Both charged that at and immediately before the time of the collision plaintiff was in the exercise of due care for his own safety. At the conclusion of the evidence on the first trial in October, 1923, the court, at the defendant's request and over plaintiff's objection, peremptorily instructed the jury to disregard the first count, and the case was submitted to the jury under the second count only, and it returned a verdict finding defendant not guilty, and a judgment thereafter was rendered against

[illegible]

the plaintiff. Among the general instructions then given to the jury at defendant's request was one to the effect that such evidence as the court had admitted, on the question whether a flagman was stationed at the crossing, had been admitted not as tending to show any negligence on defendant's part in not so maintaining a flagman, but solely as bearing upon the question of defendant's alleged negligence in running its engine. Under these two instructions practically the only questions submitted to the jury on the first trial were (a) whether plaintiff was guilty of contributory negligence, and (b) whether defendant was negligent in running its engine, which negligence proximately caused plaintiff's injuries. These questions the jury decided adversely to plaintiff and the court confirmed their verdict. Upon a writ of error subsequently sued out of this Appellate court, in which a reversal of the judgment was asked solely upon the ground of the giving of said two instructions and certain others, this court, on October 7, 1924, reversed the first judgment and remanded the cause for a new trial solely upon the ground of the giving of said two instructions. (McMullen v. Illinois Central R. Co., 234 Ill. App. 416, 429.) In the opinion then filed it is said (p. 422) that, "under the allegations of the first count and the facts in evidence, it was for the jury to say whether ordinary and reasonable care on defendant's part required it to maintain a flagman at the crossing." After the cause had been redocketed plaintiff filed an additional count, substantially a combination of the two original counts, to which defendant's former plea of the general issue was ordered to stand.

Upon the second trial the cause was submitted to a jury upon both of the original counts and the additional count, and the jury again returned a verdict finding the defendant not guilty, and the second judgment against plaintiff followed. The evidence introduced was almost identical with that heard on the

first trial. Indeed, the abstract of the evidence, as given on the first trial and as filed in this Appellate court on the first writ of error, was used by agreement as the bill of exceptions as to the evidence heard on the second trial. The only additional evidence is that shown in a stipulation of the parties as to the number of regular scheduled passenger trains operated daily over the crossing between the hours of seven a. m. and seven p. m., on and prior to February 13, 1922. The total number was 169, and of that number 17 used the particular track on which the collision occurred. The total number of such trains crossing over all of the tracks between the hours of one o'clock and two o'clock p. m. was nine.

It thus appears that the second jury has passed upon the question, adversely to plaintiff, whether defendant was guilty of negligence in failing to maintain a flagman at the crossing, and that two juries, upon substantially the same evidence, have passed upon the questions, adversely to plaintiff, whether he was guilty of contributory negligence, and whether defendant's engine crew were guilty of such negligence in running the engine as proximately caused plaintiff's injuries. While the evidence was conflicting on the questions whether the engine was being run at an excessive rate of speed under all the circumstances, and whether its bell was ringing at and immediately before the time of the collision, we do not regard the case as particularly close on the question of plaintiff's contributory negligence. Indeed, we think that there was ample evidence to sustain the finding that he was himself guilty of negligence proximately causing his injuries. Furthermore, the concurrence of two like verdicts strengthens the presumption that the second verdict was proper and supported by the evidence. (Long v. Long, 132 Ill. App. 409, 412; McKinnie v. Lane, 133 Ill. App. 438, 441.)

The sole ground urged by plaintiff's counsel for a reversal of the present judgment is that the second verdict was brought

about by the giving of the instructions requested by defendant, which were prejudicial to plaintiff. At the outset it may be said that the presumption obtains that the court ruled correctly as to the instructions, and in order to overcome that presumption plaintiff must show affirmatively that error has intervened. (Chicago & Alton R. Co. v. American Strawboard Co., 190 Ill. 268, 275; Illinois Central R. Co. v. Jernigan, 198 Ill. 297, 302.) And in Funk v. Babbitt, 156 Ill. 408, 415, it is said, concerning the question whether certain given instructions were erroneous and prejudicial, that the test is, "not what the ingenuity of counsel can, at leisure, work out the instructions to mean, but how and in what sense, under the evidence before them and the circumstances of the trial, would ordinary men and jurors understand the instructions." On the second trial the court gave 25 instructions, of which 9 were requested by plaintiff and 16 by defendant. Of those requested by defendant 5 covered general subjects, and the remaining 11 referred to the two main questions, viz, the negligence of defendant and the contributory negligence of plaintiff, and they presented different aspects of those questions as disclosed from the evidence. Of these 11 instructions 9 contained the direction either that the jury should "find the defendant not guilty," or that "plaintiff cannot recover."

Plaintiff's counsel first contends that defendant's instructions in their entirety prejudiced plaintiff in that there were too many of them; that they were argumentative, abounded in repetitions, and unduly emphasized matters favorable to defendant and unduly minimized matters favorable to plaintiff; and that too many directed a verdict for defendant. After carefully examining the instructions in connection with the facts and circumstances in evidence and the various elements bearing upon said two main questions, we do not think that they were objectionable or prejudicial

to plaintiff in any of the particulars urged, or in their entirety. A somewhat similar contention was made, unsuccessfully, in the case of Carson, Pirie, Scott & Co. v. Chicago Ry. Co., 309 Ill. 346, 352 and what was said in the opinion is applicable here, viz: "There were five instructions given stating the rule of law that required Martin to exercise ordinary care for his own safety and advising the jury that the plaintiff could not recover if Martin failed to exercise such care. The instructions correctly stated the law, and the objection made is that there was needless repetition, bringing the question of the exercise of care by Martin too prominently before the jury. That was one of the material issues in the case, and while needless repetition may give undue prominence to some matter to which the instructions relate, these instructions presented different aspects of the question."

Counsel also contends that three of defendant's given instructions, regarding the care required of plaintiff, and which directed a verdict, were misleading and prejudicial in that they ignored the fact that he was a minor of about 18 years of age, stated in varying language that he was required to exercise ordinary care, or the care which a reasonably prudent person would have exercised, etc., and did not state that he was required to exercise only that degree of care which a person of his age, experience, intelligence, capacity and discretion would ordinarily exercise under the same or similar circumstances. We do not think that there is any merit in the contention. The evidence shows that plaintiff had had an extensive experience as a driver of motor vehicles, particularly the trucks of his employer, and that he had driven its trucks over the roadway almost daily for about nine months. Furthermore, among the series of 25 given instructions the court gave one, No. 5, requested by plaintiff, wherein the jury were

instructed that "when it is said in these instructions that plaintiff was required to exercise ordinary care for his own safety, it is meant that he was required to exercise that degree of care which an ordinarily prudent person of his age, capacity, intelligence and experience would exercise under the same or similar conditions."

Other given instructions requested by defendant are complained of. We deem it unnecessary to discuss them in detail. Suffice it to say that we regard counsel's criticisms of them more technical than substantial, and that we find them free from any such errors as require a reversal of the judgment, particularly after two juries have passed upon the main issues of the case adversely to plaintiff. Our conclusions are that the jury were fairly and properly instructed, and that the judgment, following their verdict, should be affirmed, and it is so ordered.

AFFIRMED.

Fitch and Barnes, JJ., concur.

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SARAH GILLAM, KATHERINE GILLAM,
GRACE GILLAM and AMERICAN TRUST &
SAFE DEPOSIT CO., a Corporation,
Co-Executors and Co-Trustees of the
Estate of MARY GILLAM, Deceased,
Appellees,

vs.

W. M. ROBERSON,
Appellant.

242 I.A. #39

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

MR. PRESIDING JUSTICE CRITLEY

DELIVERED THE OPINION OF THE COURT.

On June 8, 1925, a judgment by confession for \$365 was entered in favor of Mary Gillam against defendant on a written lease, by the terms of which a store in a building located at 2922 State street, Chicago, had been leased as a bakery and lunchroom to defendant by Mary Gillam for a term of two years, ending April 30, 1926, for a monthly rental of \$100, payable in advance on the first day of each month. The amount of the judgment was for unpaid rent for the months of April, May and June, 1925, aggregating \$300, and \$65 attorney's fees. The lease provided for the inclusion of "reasonable attorney's fees" in case a judgment for rent was confessed. Prior to the day the judgment was confessed Mary Gillam had died, and subsequently the court vacated the judgment, and an amended statement of claim, in the name of said co-executors and co-trustees of the estate of said Mary Gillam, deceased, and a new cognovit, etc., were filed, and, on August 1, 1925, a new judgment by confession was entered in the same amount against defendant and in favor of said co-executors and co-trustees. Defendant's motion then entered to vacate that judgment, and for a trial upon the merits, was continued for subsequent hearing. The hearing was had on September 22, 1925, defendant having in the

meantime filed a written motion, supported by his affidavit, stating grounds for his motion. No other affidavits were presented. The court denied the motion and from that ruling the present appeal is taken.

We do not think that the court erred in refusing to vacate the judgment. In his written motion, as well as in his defendant affidavit in support thereof, ... admits that he owes \$200 for unpaid rent for the months of April and May, but he claims non-liability for the June rent on account of an alleged constructive eviction. He states in his affidavit, in substance, that "until the fall and winter of 1924," he had in the store a remunerative bakery and lunch business, and enjoyed the good will of his customers; that during said fall and winter and continuously thereafter up to and including May, 1925, plaintiffs (or Mary Gillam in her lifetime) negligently allowed a toilet and bathroom in use by tenants of the second floor of the building to get so out of order and remain so out of order that there was a constant leakage of foul water through the ceilings of the rooms occupied by defendant and onto dining tables used by him in his business; that, as a result and because of plaintiffs' negligence, "he had to abandon the use of the south half of his store in the early spring of 1925, and the whole building in June, 1925;" that his business "was closed about May 27, 1925;" that "he was moving his things out of the store before the judgment was secured." It will be noticed that he does not state that he actually surrendered possession of the store. For aught that appears to the contrary he may still have been in possession on August 1, 1925, when the judgment in question was entered. It is well settled that there cannot be a constructive eviction without a surrender of possession. (Keating v. Springer, 146 Ill. 481, 496; Barrett v. Bondie, 158 Ill. 479, 484.) Furthermore, so far as the rent

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for the month of June is concerned, we think it must be held that he waived his right to abandon and surrender possession of the store. The leakage, claimed to have been caused by plaintiff's negligence, was alleged to have been constant and continuous for a period of more than six months, and yet defendant remained in possession. (See, Keating v. Springer, supra.)

It seems clear to us that the trial court did not abuse its discretion in refusing to vacate the judgment and allow defendant to plead and have a trial upon the merits. Accordingly, the judgment is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

W. C. BURWELL,
Appellee,

vs.

C. ASCHNER, Doing Business
as ASCHNER'S MOTOR EXCHANGE,
Appellant.

APPEAL FROM CITY COURT OF
CHICAGO HEIGHTS.

242 I.A. 639

MR. PRESIDING JUSTICE GRIDLEY
DELIVERED THE OPINION OF THE COURT.

In an action for damages for breach of contract plaintiff, on January 16, 1926, following the verdict of a jury, recovered a judgment for \$750 against defendant and he appealed. The action was commenced on March 21, 1925.

The following facts in substance are disclosed:
In January, 1923, defendant was in the business at Chicago Heights, Illinois, of buying and selling used or second hand automobiles of all makes, and also had the agency of selling in that district "Jordan" automobiles. Plaintiff was the owner of an used "Pan American" automobile. On January 15, 1923, the parties made a verbal agreement, evidenced by a signed memorandum, that defendant would sell and plaintiff would buy a new Jordan five passenger car at the agreed price of \$1960, but that plaintiff would not take delivery thereof until one year and three months thereafter (April 15, 1924); and that in consideration of the sale being consummated defendant would allow plaintiff on the agreed price \$750 for his Pan American car, and plaintiff would pay defendant, upon delivery of the Jordan car, the balance of \$1210 in cash. When April 15, 1924, arrived, plaintiff, for financial reasons, was unable to pay said cash balance, and it was further agreed between the parties that the time of the consummation of the contract be extended until June

15, 1924. When that date arrived plaintiff still was unable to pay said cash balance, and it was further agreed that the time within which he might pay it and receive delivery of the Jordan car be further extended for one year, or until June 15, 1925. In the meantime defendant had sold to a third party plaintiff's car. Several months before the expiration of the last extended period defendant notified plaintiff that he was about to lose his agency for selling Jordan cars, and urged immediate consummation of the contract, informing him that if he did lose his agency he would be unable to allow plaintiff on the deal as much as \$750 for the Pan American car, for the reason that said allowance had originally been based on certain trade allowances and commissions to be received from the Jordan company, which would be lost to him after his said agency ceased. But plaintiff did not then consummate the contract. Later, in March, 1925, after defendant had lost his agency, plaintiff demanded delivery of a 5 passenger Jordan car. Thereupon defendant said that he would buy one in the open market and sell it to plaintiff but only upon plaintiff paying \$1410 in cash, instead of \$1210; in other words, he would only allow plaintiff \$550, instead of \$750, on the Pan American car (already sold by defendant to a third party.) Plaintiff refused the proposition and demanded that defendant return to him his Pan American car (which was impossible) or pay him \$750, and upon defendant's refusal of the demand commenced the present action.

Plaintiff's theory on the trial was that under the circumstances he was entitled to recover \$750 as damages for defendant's breach of contract; that the value of his used Pan American car was definitely fixed in the contract at that amount. It is evident from the jury's verdict that they adopted this view.

We do not think that the verdict and judgment are sustained by the evidence. Under the facts disclosed it seems clear

to us that plaintiff is only entitled to recover as damages the reasonable value of his used Pan American car at the time of the making of the contract on January 15, 1923, when it was delivered to defendant, and which car defendant thereafter sold in good faith to a third party. Plaintiff introduced no evidence whatever as to the fair, actual value of the used car at that time. The amount stated in the contract as to the allowance that defendant would make on the car, in part payment of the price of \$1950 for the Jordan car, when plaintiff's purchase thereof was finally consummated, does not afford definite evidence of the real value of the used car. The amount of that allowance was affected by trade allowances and commissions which defendant would receive in case the Jordan car was finally delivered to plaintiff, which delivery was never consummated, chiefly because of plaintiff's delays and inability to pay. We think that there should be another trial of this case, at which there be proof made of the fair, actual value of plaintiff's used car at the time mentioned. Accordingly, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Fitch and Barnes, JJ., concur.

STEVE SOMMERS,
Appellee,

vs.

VICTORY WET WASH LAUNDRY CO.,
a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

242 I.A. 639

MR. PRESIDING JUSTICE GRIDLEY
DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted to recover a judgment against defendant for \$7500, rendered after verdict on January 16, 1926, in an action for damages for permanent injuries to plaintiff's left leg, occasioned by a collision of a motorcycle on which he was riding with defendant's auto-truck at the intersection of Oakley boulevard and Harrison street, Chicago. No brief and argument has here been filed by plaintiff.

Oakley boulevard runs north and south and Harrison street, on which there were double street car tracks, runs east and west. The accident happened about 4:30 o'clock p. m., June 24, 1924, on a clear day. Immediately before the collision plaintiff was propelling the motorcycle at a rapid rate of speed south on the west side of Oakley boulevard and attempting to cross the intersection, and the auto-truck, having approached and reached the intersection from the south on the east side of Oakley boulevard, was turning westerly into Harrison street. Each driver saw the other vehicle approach the intersection and its subsequent movements. While plaintiff was attempting to propel the motorcycle either in front of the truck and between it and an east-bound street car standing immediately west of the west curb line of Oakley boulevard, or to continue his southerly course in the rear of the truck, the collision occurred. The

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evidence was conflicting on the question of plaintiff's contributory negligence and, particularly, whether the motorcycle ran into the truck, or whether the truck ran into the motorcycle. Plaintiff's testimony, and that of some of his witnesses, was to the effect that a front portion of the truck ran into the left side of the motorcycle, moved it westward and west of the square of the intersection, and threw plaintiff down upon the street and the motorcycle on top of him. The driver of the truck, on the other hand, testified in substance that the truck did not run into the motorcycle but that the motorcycle struck a rear portion of the truck on its right side; and that, after alighting from the truck and assisting plaintiff, he found that two wooden spokes of the right rear wheel of the truck had been broken and the fender dented. Inasmuch as we have reached the conclusion that the judgment must be reversed and the cause remanded for another trial because of the court's refusal to admit certain offered testimony of defendant's witness, Shemrinski, who repaired the truck after the collision, and which testimony tended strongly to corroborate that of the driver of the truck that the motorcycle collided with a right rear portion of the truck and broke two of the wooden spokes of the right rear wheel, we refrain from a further discussion of the evidence.

The witness, Shemrinski, testified in substance that when a "Stewart" auto-truck belonging to defendant was brought into his (Shemrinski's) shop for repairs on the afternoon of June 24, 1924, after the collision, he examined the truck as to its then condition. He then started to state what that condition was, but upon objection made as to the incompetency of the testimony in the absence of other proof that the truck was in the same condition when it reached said shop as it was immediately after the collision and was the same truck as was in the collision, the court

would not allow the witness to so state. Other evidence sufficiently showed that the truck brought to Shemrinski's shop and examined by him was the same truck that was in the collision; yet the court adhered to its ruling. Out of the presence of the jury, and for the purpose of accurately disclosing defendant's offer of proof, the witness testified that, upon his examination, he noticed among other things that two wooden spokes in the right rear wheel of the truck were broken out. Defendant's attorney again asked that this evidence be heard by the jury, but the court refused the request. In view of all the facts in evidence, we think that this testimony should have been admitted, as it was competent and its weight was for the jury to determine, and that in refusing to admit it the court committed error prejudicial to defendant.

For the reasons indicated the judgment of the Superior court is reversed and the cause remanded.

REVERSED AND REMANDED.

Fitch and Barnes, JJ., concur.

CHICAGO RAILWAY EQUIPMENT COMPANY,
Appellee.

v.

JAMES WILSON.

Appellant.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

242 I.A. 640

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On December 16, 1925, plaintiff commenced a forcible detainer proceeding, alleging in its complaint that it is entitled to the possession of premises, described as "4500 S. Robey street, Chicago, Illinois," which possession defendant unlawfully withholds. Upon a trial before a jury the court, after the hearing of testimony introduced by both parties, peremptorily instructed the jury to return a verdict in plaintiff's favor, which they did. The usual judgment followed and defendant appealed.

It appears from the common law record that prior to the trial defendant, in support of his motion to dismiss the complaint, filed an affidavit alleging that for more than 20 years last past he had been in continuous, notorious and adverse possession of the premises, under claim of ownership or right or color of title thereto, and that the questions in controversy between the parties were those concerning title and not possession. The bill of exceptions does not disclose, except by inference, any disposition of the motion.

Plaintiff's only witness was Irving D. Chandler, who for many years had been its representative in its real estate transactions in Chicago. Defendant was a witness in his own behalf and his testimony was corroborated in certain particulars by that of his only other witness, Reynolds. It apparently is

THE UNITED STATES OF AMERICA
DISTRICT COURT OF THE DISTRICT OF COLUMBIA

IN RE: [Name]

DEBENTURE

046 A.1948

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THE UNITED STATES OF AMERICA, Plaintiff,

vs. [Name], Defendant.

Comes now the Defendant, [Name], and moves the Court for an order that the Plaintiff be required to show cause why the Defendant should not be discharged from custody.

The Defendant moves the Court for an order that the Plaintiff be required to show cause why the Defendant should not be discharged from custody.

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The Defendant moves the Court for an order that the Plaintiff be required to show cause why the Defendant should not be discharged from custody.

The Defendant moves the Court for an order that the Plaintiff be required to show cause why the Defendant should not be discharged from custody.

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The Defendant moves the Court for an order that the Plaintiff be required to show cause why the Defendant should not be discharged from custody.

The Defendant moves the Court for an order that the Plaintiff be required to show cause why the Defendant should not be discharged from custody.

undisputed that in 1904, and prior thereto, one Thomas Carey was the owner of a tract of about 35 acres of unsubdivided land on which he conducted a certain business; that on one corner of the tract there was a two-story dwelling house which, with certain land around it (amount undisclosed), afterwards became known as 4500 S. Robey street, Chicago; that in 1904 defendant was an employee of Carey and in June of that year married; that about that time Carey told defendant that the latter and wife might move into the house, saying: "You can stay there, and it is yours as long as you like;" and that defendant and wife moved into it and, together with children born to them, thereafter continuously occupied it as their home for a period of more than 20 years, and were in possession when the present action was commenced.

Chandler testified that he first became acquainted with defendant in 1907, meeting him somewhere on the tract and having a conversation with him; that a large portion of the tract was then being used as a dump; and that then "either Mr. Carey or the Chicago Junction Railway" was the owner of the tract. He further testified over objection that afterwards during said year plaintiff obtained a lease to five acres of the tract, which five acres included the land in which this house stood. No lease was introduced in evidence and there is nothing in the record definitely disclosing its duration or terms, or the land included in it, or from whom plaintiff received it. Chandler further testified that early in 1908 he had a further conversation with defendant and gave him instructions regarding certain dumping then being made on the tract; and that in 1912 he had further conversations with him. He further testified over objection that at the times of these latter conversations "the property belonged to the Chicago Junction Railway Co. or the Central Manufacturing District" and that some time during 1912 plaintiff purchased the entire tract.

No deed to plaintiff was introduced in evidence, and the particulars of plaintiff's claimed purchase, from whom purchased, and whether the purchase included the house and the premises named in the complaint, are not disclosed. Chandler further testified in substance that about two years prior to the trial he informed defendant that plaintiff was trying to make a sale of the tract and that if such sale was consummated plaintiff would agree to give the house to defendant and move it for him onto certain vacant land owned by his mother near 47th street; that the witness further suggested that, in view of the contemplated sale and the proposed offer to move the house, plaintiff would like defendant to take a lease of the house and certain land around it for a short term; that a draft of such a lease (not produced) was made by the witness and presented to defendant but he refused to sign it; and that defendant had never paid Chandler or plaintiff any rent for the occupancy of the house. Defendant gave his version of some conversations had with Chandler, and gave other testimony, but plaintiff's attorney did not see fit to cross-examine him.

Courts of review in this State have held that "in actions of forcible detainer the question is not in whom is the title to the premises, but is one of possession and right of possession only" (Thomasson v. Wilson, 46 Ill. App. 398, 399); and that in such actions the plaintiff "must show a right of possession in himself, and he cannot rely upon the lack of right in those whom he seeks to dispossess" (Fitzgerald v. Quinn, 165 Ill. 354, 366); and that "the person who is in the actual and peaceable possession of land will be deemed to be rightfully in possession, and the burden of proof is upon him who would dispute that possessory right" (Fitzgerald v. Quinn, supra.) In view of these holdings, and of the evidence as above outlined, a majority of this court are of the opinion that the trial court erred in giving the

peremptory instruction in plaintiff's favor and in entering the judgment appealed from. It may be that in an appropriate action it can be shown that defendant is without title to the premises described in the complaint, but that question is not a subject of determination in this proceeding. Only the question of plaintiff's right to possession of the premises is in issue, and, in our opinion, plaintiff failed to sustain the burden, which the law casts upon it, of affirmatively showing by proper evidence its right to the possession of the house and the particular premises, so long and continuously occupied by defendant and his family as a home. Chandler claimed that plaintiff first obtained a lease to five acres of the tract and afterwards purchased the tract, but no lease or deed or deeds were introduced by plaintiff disclosing that the house and particular premises in question were included in said lease or conveyances. Furthermore it does not appear from whom plaintiff purchased the tract, or that it or its grantor or grantors were ever in possession of said house and particular premises. We think that there should be another trial of this case. Accordingly, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Fitch, J., concurs.

MR. JUSTICE BARNES DISSENTING:

I think defendant's own evidence shows a tenancy at will under Carey, and a subsequent recognition of plaintiff as his landlord, and presents no basis for the claim of adverse possession.

1. The first question is whether the evidence is sufficient to establish that the defendant was in the area of the crime at the time it was committed. The evidence in this case is circumstantial, but it is strong and consistent. The defendant was seen near the crime scene at the time of the crime, and there is no other explanation for his presence there.

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the situation.

It is not possible to determine the exact date of the event.

CONTINUED

SAMUEL BRODER,
Appellee,

v.

EDITH ROCKEFELLER McCORMICK,
EDWIN D. KRENN and EDWARD A.
DATO, individually and as
trustees of the Edith Rockefeller
McCormick Trust,
Appellants.

242 I.A. 640

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action of assumpsit, after the verdict of a jury in his favor, plaintiff, on November 24, 1925, recovered a judgment in the Municipal court for \$5,000, against the three defendants "individually and as trustees of the Edith Rockefeller McCormick Trust," and they appealed.

In his statement of claim, filed February 7, 1924, plaintiff alleged in substance that on September 5, 1923, he was employed by all three defendants "as individuals, to devise ways and means to form an organization wherein and whereby the defendant, Edith Rockefeller McCormick, might invest approximately fifteen million (\$15,000,000) dollars in stocks and bonds, - the income in dividends, etc., from said investment to remain with said organization, to be organized by the plaintiff, so as to save for her the tax that would necessarily be levied upon said income by the United States Government in the form of income tax, surtax and excess tax;" that thereafter plaintiff made an exhaustive examination of the income tax laws and ascertained that, by the organization of a Common Law Trust, capital of an unlimited amount might be invested and the income arising from said stocks and bonds would remain untaxable until a final distribution; that

042 348

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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CONFIDENTIAL

With a similar, but more complex, network of relationships, the

thereupon all three defendants requested the formation of such an organization and, pursuant to the arrangement, the Edith Rockefeller McCormick Trust was organized; that it was understood and agreed that plaintiff was to receive for his services in its organization "a sum commensurate with the amount of tax saved," and also was to be employed as an accountant by it and for his services as such accountant was to receive \$100 per day; that he has received payment for his services as accountant but has not received payment for his services rendered in the organization of the Trust; and that the "fair and reasonable" sum for these last named services is \$5,000, which is due and owing.

In defendants' amended affidavit of merits, signed by an authorized agent, they denied practically all of the material allegations of the statement of claim and that any sum of money was due to plaintiff from them, or either of them, as individuals or as trustees. They alleged inter alia that early in September, 1923, plaintiff was employed by defendants, Krenn and Dato (engaged as copartners in the real estate business in Chicago under the firm name of Krenn & Dato) in the capacity of accountant and bookkeeper for said firm at the agreed rate of \$40 per day; that he had been paid for such services and had been discharged from further services early in December, 1923; that his employment by said firm began before the Trust was organized; and that the plan of its organization was worked out by defendants without his aid, excepting such assistance of a clerical and accounting nature as he rendered to said firm at its request.

Plaintiff was the only witness in his behalf. His testimony was supplemented by certain letters and documents introduced. Defendants called as witnesses Edward A. Dato, Ben W. Lawless and two others. They also introduced certain letters and writings. Lawless was the attorney and assistant

manager of the firm of Krenn & Dato, and he as attorney drafted the declaration of trust of the Edith Rockefeller McCormick Trust, of which the three defendants are the only trustees.

The evidence discloses that early in September a verbal contract was entered into between plaintiff (a public accountant and not an attorney-at-law) and defendant Dato, acting for the firm of Krenn & Dato, whereby plaintiff agreed to do certain accounting work, with especial reference to the formation of the Trust, upon a per diem basis. Plaintiff's testimony and that of Dato is conflicting as to the agreed amount of the per diem charge, but this conflict is unimportant in view of plaintiff's admission that about the time his employment ceased he was paid in full, by checks of the firm of Krenn & Dato, for all his services as accountant, which were rendered during the months of September, October and November, 1923. Plaintiff claimed upon the trial that he and Dato also verbally agreed that, in addition to his services as accountant, he should be paid for other services in connection with the organization of the Trust, and that "if the organization would not exceed four or eight weeks that the price for organization would be a flat figure of \$5,000." The Trust was completely organized on October 1, 1923, less than four weeks after plaintiff's ^{first} talk with Dato, and his claim of an express verbal agreement with Dato, that he was to be paid \$5,000 for said claimed organization services, is at variance with that as set forth in his statement of claim, wherein it is alleged that he was employed by all three defendants as individuals, and that he was to receive for his said organization services "a sum commensurate with the amount of tax saved," and that the "fair and reasonable" sum for said services was \$5,000. He did not introduce any evidence showing that by virtue of his services any tax was or could be

saved, or what was the fair and reasonable value of his services. The evidence also discloses that following his first conference with Dato on September 5, 1923, plaintiff, at Dato's request, wrote him two letters (introduced in evidence) dated September 6th, in which reference is made to the discussion had at said conference, and in one of which it is stated that for any accounting work done by plaintiff the charge would be at the rate of \$100 per day; that in neither of the letters is any mention made of any additional charge for contemplated services to be rendered by him in the organization of the Trust; that he commenced working in the capacity of accountant for the firm of Krenn & Dato about September 7th; that on that day and on several succeeding days during that month he attended a number of conferences, at which Dato, Krenn and Lawless were present and at which various details of the organization of the Trust were discussed; that at none of these conferences was Mrs. McCormick present; that on November 1, 1923, plaintiff rendered two bills aggregating \$1425 - one for \$1250 for "services rendered during September," and the other for \$175 for "services rendered for October," and that in neither the bills nor any accompanying letter was any mention made that plaintiff claimed any further sum for "organization" services; and that these bills were shortly thereafter paid. Dato denied that he ever agreed to pay plaintiff any sum in addition to the agreed per diem rates for plaintiff's services in connection with the formation of the Trust.

Two of the contentions made by defendants' counsel as grounds for reversal are (1) that a judgment rendered against defendants individually and as trustees of a Trust cannot stand, because the Municipal court - a law court - is without jurisdiction to enter any judgment binding upon the trust estate and

only a personal judgment can be entered against such defendants, and (2) that, as the evidence in the instant case fails to show any liability against Mrs. McCormick and as the judgment against all three defendants is a unit, the judgment must be reversed as to all. Plaintiff's counsel practically admit the first contention and it is sustained by decisions of our Supreme Court. (Wahl v. Schmidt, 307 Ill. 331, 341; Austin v. Parzer, 317 Ill. 348, 353.) As to the second contention, if the evidence fails to show any personal liability to plaintiff on the part of Mrs. McCormick, the judgment cannot be reversed as to her and affirmed as to the other defendants, but the judgment must be reversed as to all. (Powell v. Finn, 198 Ill. 567, 569; Seymour v. Richardson Fueling Co., 208 Ill. 77, 82; Livak v. Chicago & Erie R. Co., 299 Ill. 218, 226.)

After reviewing the evidence we are of the opinion that it fails to show any liability on the part of Mrs. McCormick to plaintiff. The agreement as to his services and the compensation therefor was made solely with Dato, acting for the firm of Krenn & Dato. It does not appear that plaintiff ever saw Mrs. McCormick or that she ever knew that plaintiff was employed by Dato to render any services in the organization of the Trust, or that she ever approved or ratified plaintiff's claimed employment. And we do not think that there is any merit in the argument of plaintiff's counsel that she and the other two defendants were engaged in the common purpose of forming the Trust, and that all three defendants can be held liable for plaintiff's claimed additional services, on the theory of their being the "promoters" of the Trust. Apparently it was Dato alone who was promoting the formation of the Trust and even plaintiff's testimony shows that Dato had to "contend" with Mrs. McCormick as well as his partner, Krenn, in bringing about its formation.

only a few hundred years ago, and the whole of the world was in a state of barbarism. The first step was to establish a government, and the second was to establish a religion. The third was to establish a science, and the fourth was to establish a philosophy. The fifth was to establish a literature, and the sixth was to establish a history. The seventh was to establish a law, and the eighth was to establish a justice. The ninth was to establish a peace, and the tenth was to establish a happiness.

After reviewing the various theories of the origin of the world, it is evident that the most reasonable is the one which states that the world was created by a divine being. This theory is supported by the fact that the world is full of evidence of a divine power. The first evidence is the order and harmony of the universe. The second evidence is the beauty and grandeur of the natural world. The third evidence is the intelligence and morality of man. The fourth evidence is the existence of the Bible and other sacred writings. The fifth evidence is the testimony of the millions of people who believe in the existence of God. The sixth evidence is the fact that the world is full of miracles and wonders. The seventh evidence is the fact that the world is full of love and kindness. The eighth evidence is the fact that the world is full of hope and faith. The ninth evidence is the fact that the world is full of peace and happiness. The tenth evidence is the fact that the world is full of life and joy.

And we are further of the opinion that the verdict and judgment are against the weight of the evidence on the question whether any agreement was made by Iato to pay for any services rendered by plaintiff except upon the basis of per diem charges, which charges plaintiff rendered bills for and the same were paid in full. Defendants' counsel also complain of the court's rulings on the admission and rejection of certain evidence, but we deem it unnecessary to discuss the rulings as the questions involved are not likely to arise upon another trial.

For the reasons indicated the judgment appealed from is reversed and the cause is remanded for another trial.

REVERSED AND REMANDED.

Fitch and Barnes, JJ., concur.

F. C. STAPLES, doing business
as JOHNSON OIL BURNER CO.,
Appellee,

v.

JACOB CASSMAN, doing business
as Hotel Savoy,
Appellant.

}) APPEAL FROM
MUNICIPAL COURT
OF CHIC GO.

242 I.A. 640

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment against him for \$1134.50, entered on October 10, 1925, upon the verdict of a jury, in a first class action in assumpsit.

The action is based upon a written agreement, signed by both parties and dated August 24, 1923, and its execution followed a series of conferences had between a salesman of plaintiff (engaged in the business of selling and installing oil burners of a certain type in Chicago) and defendant (then the owner and operator of the Hotel Savoy in Chicago.) Material portions of the agreement are as follows:

"The Johnson Oil Burner Co. does hereby agree to sell to Hotel Savoy a complete equipment for oil burning for the steamboilers located in said hotel at 3000 South Michigan Avenue, Chicago, to be installed ready for operation by September 30, 1923, for the sum of \$1050, same to be paid as follows: \$250 thirty days after installation; \$200 sixty days after installation; the balance to be paid in ten equal monthly payments of \$60 each month.

It is understood this contract is not subject to countermand by the purchaser, and no verbal agreement affecting same has been made by the salesman.

Guarantee: Johnson Oil Burner Co. guarantees for a period of one year to repair or replace any part or parts of said equipment which may become disabled or broken through defective material and workmanship excepting the motor which is guaranteed by the maker."

The oil burner and equipment were installed, ready

[illegible][illegible]

$\frac{d}{dt} \left(\frac{\partial L}{\partial \dot{x}} \right) = \frac{\partial L}{\partial x}$

$\mu_{\text{H}_2\text{O}} = -285.8 \text{ kJ/mol}$; $\Delta G^\circ_f(\text{H}_2\text{O}) = -237.1 \text{ kJ/mol}$

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10. What is the purpose of the "References" section?

and most interesting, but I am not at all sure that I shall be able to do so.

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[illegible]

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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for operation, in said hotel on or about September 15, 1923, and at the time of the trial still remained in the hotel. Defendant had not paid any sum to plaintiff on the contract price.

Plaintiff's action was commenced on November 28, 1923. At this time, under the terms of the contract, only the first two installments, aggregating \$450, were due. Nevertheless, as appears from his original statement of claim, plaintiff sought to recover the total contract price, \$1050, and also the further sum of \$84.50, for certain materials furnished and labor performed, at defendant's request, in repairing the latter's old boiler front, which sum apparently is not in dispute. The ad damnum in the original statement of claim is \$1134.50. The present record discloses that, on December 12, 1923, after defendant's appearance had been entered by his attorney, the court entered an agreed order, striking said statement of claim and giving leave to plaintiff to file an amended one, which shortly thereafter was filed, and in which he sought to recover only the two installments aggregating \$450 on the contract and also said sum of \$84.50. The ad damnum in this amended statement is \$534.50, and to the statement defendant filed his affidavit of merits, in which, although admitting the installation of the oil burning equipment in the hotel, he denied that he had entered into the contract of August 24, 1923, (he admitted his signature thereto when a witness on the stand), and set forth as a defense in substance that, prior to said installation, it was verbally agreed that said equipment was to work to his satisfaction and, after installation and tests made, it did not work to his satisfaction. The record further discloses that on the day the case was called for trial, September 14, 1925, plaintiff was given leave to amend his amended statement of claim "on its face by increasing the ad damnum to \$1134.50," but it does not appear that said statement of claim

ever actually was amended.

On the trial, after the contract had been introduced in evidence, and plaintiff had given testimony, showing the installation of the equipment and its satisfactory working after numerous tests made, and that defendant's only complaint was that more oil was used in its operation than he had anticipated, and that defendant had promised repeatedly to make payments to him but had paid nothing, defendant was allowed by the court, over objection, and notwithstanding the terms of the contract, to introduce evidence tending to show that, prior to the installation of the equipment, plaintiff's salesman, and plaintiff himself, verbally had warranted or guaranteed that it would properly heat the hotel in the coldest weather and that it did not do so. While we think that much of this evidence was improperly admitted, because of the signing of the contract showing the actual agreement between the parties (Pickrel v. Rose, 87 Ill. 263, 265, Armstrong Paint Works v. Continental Can Co., 301 Ill. 102, 106), it is evident from the jury's verdict that they gave little credence to this evidence, and we think that their verdict, so far as defendant's liability to pay for the equipment is concerned, is amply sustained by the evidence.

But we are of the opinion that the judgment against defendant for \$1134.50, cannot stand. It is \$600 in excess of the ad damnum contained in plaintiff's amended statement of claim, which never actually was amended. In cases in the circuit courts of this State it is not alone sufficient that an order allowing an amendment to a declaration be entered, but the amendment to be effective must actually be made. (Wisconsin Central R. Co. v. Wiczorek, 151 Ill. 579, 583; People v. Cleveland, etc. R. Co., 314 Ill. 455, 457.) And we think that the same rule should be applied to amendments of statements of claim in the Municipal

Court of Chicago in actions of the first class. (Sec. 3, Municipal Court Act, Cahill's Stat. 1925, p. 801.) And it is well settled that "it is error to render judgment for a larger ^{than} sum that claimed in the declaration, whatever the form of action." (Brown v. Smith, 24 Ill. 196, 197; Foreman v. Sawyer, 73 Ill. 484, 485; American Exchange Bank v. Mitchell, 179 Ill. App. 612, 616.) Furthermore, it appears that when the present action was commenced (November 28, 1923) only the first two installments, mentioned in the contract and aggregating \$450, were due, and plaintiff's total claim, then matured, against defendant amounted to only \$534.50. While it is the law that, on a contract for the payment of money in installments assumpsit will usually lie to recover each installment as it falls due without waiting for the last to mature, yet it is well settled that, where a suit is brought upon such a contract, the plaintiff can only recover the amount that is due at the time the suit is brought, although at the time of the trial all the installments may have matured. (Remlin, Hale & Co. v. Race, 78 Ill. 422, 424; Collins v. Monteny, 3 Ill. App. 182, 184; Kahn v. Cook, 22 Ill. App. 559, 561.)

Our conclusion is that the judgment appealed from must be reversed and the cause remanded, unless plaintiff, within 10 days shall file in this court a remittitur of \$600 from the judgment, in which event the judgment against defendant shall be affirmed to the extent only of \$534.50, and each party shall pay his own costs in this court. If plaintiff files such remittitur it shall be without prejudice to his right thereafter to commence an appropriate action for the recovery of those installments mentioned in the contract which matured after the present action was commenced.

REVERSED AND REMANDED, OR TO BE AFFIRMED TO THE EXTENT OF \$534.50, IN CASE PLAINTIFF FILES A REMITTITUR OF \$600, WITHIN 10 DAYS.

Fitch and Barnes, JJ., concur.

RUBIN ROSENBERG and
D. ROSENFELD,
Appellants,

v.

MAURICE NOVICK, FANNIE
NOVICK and HEINIS ISLEFMAN,
Appellees.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

242 I.A. 640

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought a fourth class action in contract to recover of defendants \$1,000, as commissions claimed to be due them as real estate brokers. A trial was had before a jury in December, 1925, and at the conclusion of plaintiffs' evidence the court instructed the jury to find the issues in defendants' favor. The jury returned such a verdict, a judgment against plaintiffs for costs followed, and they appealed.

It appears from plaintiffs' evidence that defendants were the owners of a certain building, located at the southwest corner of 61st and Carpenter streets, Chicago, and that in June, 1923, following plaintiffs' negotiations and efforts, defendants signed the written instrument sued upon, wherein for a stipulated price they agreed to sell the building to one Sam Nimerov, upon certain mentioned conditions and upon certain payments being made by him from time to time. When defendants signed the instrument Nimerov paid them \$1,000 as a "deposit," but he did not then or thereafter sign the instrument, which provided that he was to pay "another \$1,000 when contract will be made by attorneys," and "\$11,000 at the close of the sale," and to execute certain notes and mortgages. Apparently Nimerov thereafter decided not to consummate the deal, for he did not make the second \$1,000 payment, or that of \$11,000. It was further provided in the instrument

that defendants agreed to pay to plaintiffs, real estate brokers, "for their work in helping us to sell the building to Mr. Nimerov, \$1,000, commission, - \$500 to be paid when Mr. Nimerov will pay the second thousand dollars, and another \$500 at the close of the deal."

Under the evidence we think that the actions of the trial court, in directing a verdict in defendants' favor and in entering the judgment appealed from, were clearly right. According to the terms of the instrument the payment of the claimed commissions to plaintiffs was dependent upon Nimerov doing two things, viz, making the second payment of \$1,000, and consummating his purchase of the building. He did neither of these things and, hence, according to plaintiffs' own showing, nothing was due them as commissions.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

JOSEPH KAGAN,
Appellee,

v.

SALEMONIS ANDREONI and
EUGENE ANDREONI, doing
business as Andreoni Bros.,
Appellants.

242 I.A. 641

APPEAL FROM

SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On October 31, 1925, following the verdict of a jury, plaintiff recovered a judgment for \$502.03, against defendants, for damages to his automobile, occasioned by defendants' heavy auto-truck colliding with it early in the afternoon of October 5, 1923, at the intersection of Kedzie avenue, a north and south street, and Grand avenue, an east and west street, in Chicago. This appeal followed.

No question is raised as to the amount of the verdict, and, practically, the only point urged for a reversal of the judgment is, that the verdict is against the weight of the evidence on the question of plaintiff's contributory negligence at and immediately before the time of the collision. Plaintiff and Salemonis Andreoni, one of the defendants, were the only witnesses who testified as to the happening of the accident. Plaintiff was driving his automobile south in Kedzie avenue at a not excessive rate of speed and was attempting to cross Grand avenue in his further progress southward. Defendants' auto-truck, driven by Salemonis Andreoni westward on the north side of Grand avenue, approached the intersection at a rapid rate of speed, entered it, and, proceeding in a southwesterly direction, collided with the automobile in the southwest corner of the intersection. While plaintiff's testimony on cross-examination is somewhat uncertain

as to when he first saw the truck and its then position, and where it was when he was in the act of crossing the street car tracks, which ran east and west in the center of Grand avenue, it is apparent from all the testimony that his car reached the intersection first and that, under the statute, he had the right of way. (Sec. 33, Motor Vehicle Act, Cahill's Stat., 1923, p. 2339.) Under the evidence we think it was peculiarly within the province of the jury to say whether or not plaintiff was guilty of contributory negligence, and that their verdict, to the effect that he was not, should not be disturbed.

On the day following the accident, according to plaintiff's testimony, when he, accompanied by one Gollusch who afterwards repaired the automobile, called at defendants' place of business to make claim for the contemplated repairs, the driver of the truck then stated that he could not avoid the collision because his "brakes did not work." Gollusch's testimony corroborated that of plaintiff in this particular, but the driver of the truck denied ever having made such statement.

The judgment of the Superior court should be affirmed and it is so ordered.

AFFIRMED.

Fitch and Barnes, JJ., concur.

PLAMONDON-GABRIEL COMPANY,
a corporation,
Appellant,

v.

EMMA T. BURT,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

242 I.A. 641

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On August 1, 1923, plaintiff commenced a fourth-class action in contract to recover the sum of \$410, being the agreed price for certain labor performed and materials furnished, during the months of September and October, 1922, in painting and decorating defendant's apartment in the McLennan Apartment Building, 219 Lake Shore drive, Chicago. The work was done under plaintiff's written proposal, containing specifications, delivered to defendant and verbally accepted by her. The cause was tried before a jury in October, 1925, and they returned a verdict finding the issues against plaintiff. After overruling motions for a new trial and in arrest of judgment, the court entered a judgment for costs against plaintiff and this appeal followed. Appellee, defendant below, has not filed a printed brief or argument in this appellate court.

In defendant's amended affidavit of merits she admitted that plaintiff had agreed to do certain painting and decorating work in her apartment for said agreed price, and had performed certain of such work, but she alleged that it has not been performed "as per agreement," but in a "negligent, slipshod and unworkmanlike manner," and that as a result she had sustained damages "in the sum of \$300," for which she "claims a set off." On the trial the testimony was conflicting as to whether the work

PLANNING AND DEVELOPMENT
CORPORATION
MEMPHIS, TENNESSEE

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MEMPHIS, TENNESSEE
APRIL 1, 1968

100 - 1000

On August 12, 1967, Plaintiff's Commission on the
Commission in connection with the case of the
place for certain labor practices and minimum wage laws,
the months of September and October 1967, in which the
having defendant's presence in the Memphis, Tennessee
the Lake, Memphis, Tennessee. The work was done under
Litt's written proposal, defendant's presence, which is
defendant and was his account of the work done and
before a jury in Memphis, Tennessee, and that defendant
finding the same against plaintiff. That defendant
for a new trial and in view of the fact that the
judgment for costs against plaintiff and the
judgment, defendant's, has not been a final order of
judgment in this appeal case.

In defendant's motion for judgment of costs the
that plaintiff had agreed to no certain amount and defendant
work in his contract for this appeal case, and that defendant
results of such work, and the appeal case is not yet
formed the per agreement, but in a judgment, although the
workmanlike manner, and that as a result of the
damages "in the sum of \$500," for which the
On the trial the testimony was conflicting as to whether the work

had been performed according to the specifications contained in the proposal, or in a workmanlike manner. Defendant, being absent from town at the time of the trial, did not testify, but her sister, Marie K. Ziegler, who lived with her in the apartment, was her principal witness, and her testimony was to the effect that, because of the unworkmanlike manner in which most of the work had been done, it had to be and was done over by another decorator, but she admitted that certain panels, as painted or decorated by plaintiff in one of the rooms, remained and were not done over.

The main ground urged by plaintiff's counsel for a reversal of the judgment is, the error of the trial judge in verbally giving a certain instruction to the jury, at the door of the jury room, after they had retired to deliberate upon their verdict, and in the absence of the attorneys for the respective parties. In the bill of exceptions appears the following as certified by the trial judge:

"After the judge had instructed the jury, they immediately withdrew to the jury room to consider their verdict at about 12 o'clock, noon. The court did not adjourn or take a recess. At 12:45 p. m., the bailiff in charge of the jury asked the judge if he wished to provide lunch for the jurors, whereupon the judge knocked at the door of the jury room, stood in the doorway, and asked the jurors if they wanted lunch. The foreman of the jury said 'No,' but wanted to know if the jury could find for less than the entire sum claimed by plaintiff. The judge responded that, under the pleadings and statements of the attorneys, if they found for the plaintiff at all, it must be for the full amount. This was all the conversation between judge and jury, and it took place with the door open and the clerk and bailiff present. The attorneys were not present * * but had left the room without requesting permission from the judge to do so. To which conduct of the Court after the retiring of the jury, the attorney for plaintiff excepted, as soon as learning the same, and argued the same as one of the points for a new trial, which the trial judge overruled."

In view of prior decisions of our Supreme Court and of the courts of review of other States, we are of the opinion that the actions of the trial judge, as stated, require that the judgment

appealed from be reversed and the cause be remanded for another trial. (Crabtree v. Hagenbaugh, 23 Ill. 349; Chicago & Alton R. Co. v. Robbins, 159 Ill. 598, 600; City of Mound City v. Mason, 262 Ill. 392, 399; People v. Beck, 305 Ill. 593, 596; Sargent v. Roberts, 1 Pick (Mass.) 337, 341; O'Connor v. Guthrie, 11 Iowa 80; Havener v. State, 125 Wis. 444, 445.) In several of these decisions it is held that such actions on the part of a trial judge, in giving instructions to the jury, either verbally or in writing, not in open court and in the absence of the attorneys of the parties, constitute reversible error, even though the instructions may have been correct. In the instant case we think that the judge's verbal instruction, in response to the foreman's inquiry, that if the jury "found for the plaintiff at all, it must be for the full amount," was prejudicial to plaintiff, because, under the pleadings and the evidence, the jury could, with propriety, have returned a verdict in favor of plaintiff in a sum less than the amount claimed.

Accordingly, the judgment appealed from is reversed and the cause remanded.

REVERSED AND REMANDED.

Fitch and Barnes, JJ., concur.

C. M. CALDWELL,
Appellee,

v.

H. C. ANSON,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

242 I.A. 641

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action in forcible detainer, commenced September 14, 1925, to recover possession of the premises known as Nos. 530-532 West 79th street, Chicago, there was a trial before a jury, during which both parties testified and plaintiff introduced certain deeds and writings. The court instructed the jury to return a verdict for plaintiff, and, such a verdict being returned, judgment for possession was entered in his favor and defendant appealed.

This is plaintiff's second action against defendant to recover the possession of the premises in question, - both actions being based upon paragraph sixth of Section 2 of the Forcible Entry and Detainer Act. In the former action, commenced April 11, 1924, the court, after a hearing, instructed the jury to return a verdict in plaintiff's favor and a judgment against defendant followed. From this judgment defendant perfected an appeal to this appellate court, Case No. 29592, and, on June 9, 1925, the judgment was reversed and the cause remanded (Caldwell v. Anson, 238 Ill. App. 611.) From the opinion (not published) it appears that the evidence was conflicting on the question of fact whether any written demand for possession had actually been served upon defendant before the suit was commenced, which demand, it was held, was a condition precedent to plaintiff's right of recovery under the provisions of the statute. And it was further

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
IN SENATE
JANUARY 1911
JAMES H. HANCOCK, JR.
vs.
JAMES H. HANCOCK, JR.
JAMES H. HANCOCK, JR.
JAMES H. HANCOCK, JR.

James H. Hancock, Jr., Plaintiff,
vs.
James H. Hancock, Jr., Defendant.
The Court has heard the evidence
presented by the parties and
has concluded that the
defendant is entitled to
judgment as a matter of
law.

This is a bill in equity
to recover the possession of
the premises in question -
action being based upon
title of record. At the
hearing held on the 19th day
of January, 1911, the
defendant presented evidence
to show that the premises
in question were owned by
him at the time of the
death of his father, James
H. Hancock, Sr., and that
he was entitled to the
possession of the premises
as a matter of course.
The plaintiff presented
evidence to show that the
premises were owned by
him at the time of the
death of his father, James
H. Hancock, Sr., and that
he was entitled to the
possession of the premises
as a matter of course.
The Court has heard the
evidence presented by the
parties and has concluded
that the defendant is
entitled to judgment as
a matter of law.

held that, in view of the conflicting evidence on this material fact, the trial court had erred in directing a verdict for plaintiff. And in the concluding clause of the opinion it was stated: "For the error of the court in directing a verdict, and only for that reason, we are constrained to hold that the judgment must be reversed and the cause remanded."

After said reversal plaintiff, on August 18, 1925, duly served upon defendant a written demand for possession of the premises, and thereafter commenced this new action. On the trial defendant admitted the receipt of the demand, so there is now no dispute as to whether a written demand for possession was made before the commencement of the suit. And the evidence heard is very similar to that introduced on the former trial.

The present transcript discloses that the premises consist of two lots, improved with a three-story brick and stone building; that on the first floor there are two stores and above the stores are four flats; that one of the stores and one of the flats are occupied by defendant, and have been occupied by him for more than five years prior to the commencement of the present suit; that the Fern Undertaking Co. occupies the other store and that all the remaining flats are vacant; that in 1918 the then owners of the premises, to secure a loan, executed certain notes, secured by mortgage on the premises; that thereafter the holder of the notes instituted a foreclosure suit in the Circuit Court of Cook County, resulting in the entry of a decree of sale of the premises; that defendant was made a party to the bill and served with process; that on August 17, 1920, the master sold the premises and there was a deficiency decree of \$826.67; that a receiver had been appointed pending the hearing of the foreclosure suit and he continued to act as receiver during the redemption period; that defendant attorned to the receiver and paid rent to

that reason, we are convinced to hold that the defendant was
"for the sake of the Court in this case a witness who was not
sifted. And in the resulting sense of the opinion of the Court
fact, the trial court had error in directing a verdict for the
defendant, in view of the conflicting evidence on this material

THEY ARE THE ONLY TWO IN THE WORLD

very similar to that introduced in the former trial.

The present document is attached and the promised copy of the report is being sent to the President of the Council of Ministers.

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with process; that on August 17, 1960, the subject was released from custody and there was a delinquent record of subject; that

1. The following information was obtained from the records of the Federal Bureau of Investigation, Bureau of Prisons, and the United States Department of Justice, Office of the Inspector General, regarding the activities of the above named individuals:

him; that on December 20, 1921, the master's deed of the premises was issued to Walter D. Harris, assignee of the master's certificate of sale; that since the receiver's discharge in December, 1921, defendant has not paid rent to anyone; and that plaintiff purchased the premises from Harris - the latter and wife conveying the same to him by quitclaim deed, dated November 1, 1922, and duly recorded on February 7, 1923.

In our former opinion we stated that upon the first trial "the defendant undertook to set up an adverse claim of title, to-wit, that Harris had agreed (whether orally or in writing is not clear) to convey to defendant a half interest in the property on certain conditions, and that Harris failed to keep this agreement," and in commenting upon this claim, we further stated: "Manifestly, such a claim, if proved, would be no defense in this proceeding, if the plaintiff made the statutory demand for possession."

Defendant made a similar claim as a defense to the present suit. He testified that he had a conversation in December, 1921, with said Harris, relative to the purchase of the premises. The court would not allow him to state what that conversation was, and thereupon his attorney offered to prove by the witness that it was verbally agreed between defendant and Harris that the former was "to have an undivided one-half interest in this property * * known as 530 - 532 West 79th Street;" that, in pursuance of that agreement, and after Harris had obtained the Master's deed on December 20, 1921, he (defendant) went into possession under Harris "as an undivided owner of a one-half interest therein;" and that his possession of the premises "has continued since that time under the said agreement with Harris." Plaintiff's attorney objected to the offer on the ground that it was an attempt to establish title under a verbal agreement against the provisions of the Statute of Frauds, and, furthermore, that questions of title could not be litigated in

forcible detainer proceedings. The trial court refused to allow this offered testimony to go to the jury, and we think that the ruling was correct. It is well settled that "a verbal contract within the condemnation of the Statute of Frauds cannot be enforced in any way, either directly or indirectly, and cannot be made either the ground of a demand or the ground of a defense." (McGinnis v. Fernandes, 126 Ill. 228, 232; Wheeler v. Frankenthal & Bro., 78 Ill. 124, 126.) It is equally well settled that in actions of forcible detainer the title to the land cannot be inquired into, and that the right to possession is all that is involved or can be determined. (Kepley v. Luke, 106 Ill. 395, 397; Kratz v. Buck, 111 Ill. 40, 47; Johnson v. Baker, 38 Ill. 98, 102.) And it was proper, and indeed necessary, for plaintiff to introduce in evidence the foreclosure decree, the master's deed to Harris and the deed from Harris to plaintiff, in order to show his right to the possession of the premises (Peters v. Balke, 170 Ill. 304, 311; Kratz v. Buck, *supra*; Johnson v. Baker, *supra*); and in order to show that defendant's right to possession, if any he had at any time, had ceased, and that the right to possession had been conveyed to plaintiff (Palmer v. Frank, 169 Ill. 90, 91.) In our opinion plaintiff's evidence clearly showed his right to possession of the premises, and, there being no competent evidence introduced by defendant tending to the contrary, the trial court properly directed a verdict in plaintiff's favor. (Revinia Co. v. Strobel, 193 Ill. App. 378, 379; Livingston v. Frey, 201 Ill. App. 380, 381.)

It is urged that the judgment for the possession of the entire premises is erroneous, because it appears from the evidence that defendant was occupying only a portion thereof, viz, one of the stores and one of the flats. The point is without merit. It clearly appearing that plaintiff is entitled to the possession of the whole of the premises, the judgment was proper

(Sec. 13, Forcible Entry & Detainer Act; Hardin v. County of Sangamon, 71 Ill. App. 103, 118; Golden v. Henker, 132 Ill. App. 25, 28.) In the Hardin case, after quoting said section, it

is said: "Whether the judgment and execution should be for the whole or only a part of the premises claimed, if either, is thus made to depend not on the extent of the defendant's actual possession, but on that of the plaintiff's right of possession."

The judgment of the Municipal court should be affirmed and it is so ordered.

AFFIRMED.

Fitch and Barnes, JJ., concur.

242 I.A. 641

WILL W. HALL,
Defendant in Error,

vs.

CHICAGO MOTOR BUS CO.,
a Corporation,
Plaintiff in Error.

ERROR TO COUNTY COURT OF
COOK COUNTY.

MR. JUSTICE BARKES DELIVERED THE OPINION OF THE COURT.

This case grows out of a collision at the intersection of Rush and Pearson streets, Chicago, between the automobile of plaintiff and a 'bus' of defendant. The declaration is predicated and issue is taken on the exercise of due care by the former and negligent and careless driving of the latter.

One of the errors assigned is that the verdict was against the evidence. On reading the testimony we think the error is well assigned.

Plaintiff's automobile was going southeast on Rush street and the ^{east} bus on Pearson street. They collided practically at the center of the intersection, a little south of the center line of Pearson, the witnesses differing whether east or west of the center line of Rush street. But the latter fact is more or less immaterial in view of other circumstances of the case. The accident apparently occurred - as testified to by plaintiff - near the center of the intersection. Enclosing the northwest corner, where construction work was in progress, was a board fence about 10 feet high built around about 6 feet outside the curb, according to plaintiff's own testimony.

The bus was approaching the crossing from the direction and on the side given the right of way by law and the statute, and if, as testified to by three witnesses for defendant against the possible construction of the testimony of only one witness, it had entered the intersection before plaintiff's car had reached the

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THE U. S. DEPT. OF AGRICULTURE
WASHINGTON, D. C.
OFFICE OF THE SECRETARY
DIVISION OF ENTOMOLOGY
WASHINGTON, D. C.

1. The following is a list of the insects of the order...

The first group of insects is the Hymenoptera, which includes the bees, wasps, and ants. These insects are of great importance to the farmer, as they are the principal pollinators of the crops. The second group is the Coleoptera, or beetles, which are also of great importance to the farmer, as they are the principal pests of the crops. The third group is the Lepidoptera, or butterflies and moths, which are also of great importance to the farmer, as they are the principal pests of the crops. The fourth group is the Diptera, or flies, which are also of great importance to the farmer, as they are the principal pests of the crops. The fifth group is the Neuroptera, or lacewings, which are also of great importance to the farmer, as they are the principal pests of the crops. The sixth group is the Thysanoptera, or thrips, which are also of great importance to the farmer, as they are the principal pests of the crops. The seventh group is the Hemiptera, or true bugs, which are also of great importance to the farmer, as they are the principal pests of the crops. The eighth group is the Heteroptera, or true bugs, which are also of great importance to the farmer, as they are the principal pests of the crops. The ninth group is the Isoptera, or termites, which are also of great importance to the farmer, as they are the principal pests of the crops. The tenth group is the Phlebotominae, or sandflies, which are also of great importance to the farmer, as they are the principal pests of the crops.

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north line of Pearson street, it clearly had the right of way, and plaintiff should have controlled his car accordingly. That the bus had already reached or was about to enter the intersection as plaintiff reached or came into it may also be inferred from the proof as to the relative rate of speed and the written admission of plaintiff himself that he did not see the bus until he was "in the center of Pearson street when it was within five feet of his car," together with his testimony and that of one of his witnesses that he was traveling about 15 miles an hour when he passed the line of the fence.

Besides the testimony of the speed of plaintiff's car as aforesaid, three eye-witnesses testified that plaintiff's car was going from 25 to 35 miles an hour, and that the bus had stopped before entering the intersection and was going across it at a slow rate of speed from 7 to 12 miles an hour. It was not only a residence section in which plaintiff was prima facie, under the statute, driving without reasonable care as to speed, but he was obliged to be mindful of the right of way for cars approaching from the west, which he could not see until he had gotten into the intersection at or past the south line of the fence, thus requiring extra caution as to speed by reason of these peculiar circumstances. It certainly could not be deemed exercise of due care on his part to drive into the intersection under such circumstances at the rate of 15 miles an hour, especially as Pearson street was only 35 feet wide. The danger of a collision under such circumstances must have been obvious at such a rate of speed, because on account of the fence neither driver could see the other until within a few feet of the point where the cars would cross one another's line of travel. Under such circumstances defendant might well place special reliance on its right of way. The preponderant testimony is to the effect that the defendant had the right of way and was exercising

due care, and that plaintiff disregarded that right and drove across the intersection at a reckless rate of speed under the circumstances.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

THE STATE OF NEW YORK, COUNTY OF ALBANY, ss.
I, the undersigned, Clerk of the County of Albany,
do hereby certify that the within and foregoing
is a true and correct copy of the original
as the same appears from the records of the
County of Albany.

Witness my hand and seal of office, this 1st day of March, 1901.

P. A. WHITE, Trustee of the
EAST OHIO HOTEL COMPANY,
a corporation, bankrupt,
Appellant,
v.
L. J. STEVENS et al.,
Appellees.

242 I.A. 641

APPEAL FROM
SUPERIOR COURT,
COCK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from the dismissal of an amended bill of complaint for want of equity, after a hearing of the evidence by the chancellor.

The bill is brought by the trustee of a bankrupt hotel company, organized in the State of Ohio, for the recovery of an alleged unpaid balance of subscription for 500 shares of the capital stock of the bankrupt company from assignees or transferees of said shares, under provisions of an Ohio statute. The answer claims said shares were paid for in full.

The 500 shares were subscribed for by one David Olmsted, and three other shares were subscribed for by his associates and were controlled by him.

Previous to the transaction in question he and his associates were connected in one way or another in interest or business with one or more of the several defendants, who in turn were more or less intricately connected in business relationships. It is largely upon these complicated relationships that complainant bases the claim of liability of the several defendants.

But if, as we think, on review of the evidence complainant failed to show any fraud or unfair dealing in the transactions by which defendants contend the subscriptions for the 500 shares were

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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1. The first group of the population is the one that is most affected by the economic crisis. This group is composed of the elderly, the unemployed, and the low-income population. They are the ones who are most vulnerable to the effects of the crisis, and they are the ones who need the most help.

THE UNIVERSITY OF CHICAGO PRESS

paid in full, then there is no necessity of following appellant's discussion of the different phases of the involved relationships. In other words, if by these transactions the hotel company received and accepted the equivalent of a cash payment without fraud, unfairness or deceit in the negotiations, there is no real ground for equitable relief.

The transactions themselves upon which the issue hinges are more or less simple.

With the view of organizing and promoting a hotel company - a line of business in which all the defendants were in one way or another interested and to some extent connected - Olmsted acquired a twenty-year lease of the Warren Hotel in Warren, Ohio, to operate which the bankrupt hotel company was later organized. The hotel was then without furniture or equipment. The lease was subsequently transferred by Olmsted to the hotel company. Defendant H. L. Stevens & Company, a corporation, was engaged in the business of supplying furniture and equipment for hotels, and by letter of January 31, 1920, before the organization of the hotel company, Olmsted gave the Stevens Company a contract therefor, agreeing to pay a fee or commission of 15 per cent of the entire cost of the furniture and equipment installed in place, on which the Stevens Company in effect advanced over \$35,000, the balance being paid by notes to the furniture dealers executed by the Hotel Company. Olmsted was president of the hotel company. The commission amounted to \$14,491 and was applied as hereinafter stated, on Olmsted's subscription in payment of his stock, and that is the amount here in controversy.

To pay for the 503 shares of stock Olmsted negotiated a loan for \$50,300 from said H. L. Stevens & Company, for which he gave his note, to be secured by deposit of the 503 shares when issued. The furniture and equipment were duly installed in the hotel by said Stevens Company in the fall of 1920 and the early

case in this, when there is no necessity of liquidating the
 dissolution of the old form of the company and its assets
 in other words, if it does not involve the liquidation of the
 and accepted the payment of a cash payment - it is a liquidation
 fairness or equity in the transactions, there is no need to
 for a judicial review.

The transactions themselves were made in the same manner
 are more or less similar.

With the view of obtaining the proceeds of the liquidation
 of the business in which the liquidation was in the act of
 another interested and to some extent connected - the liquidation
 twenty-year lease of the hotel and in which the hotel was
 which the hotel and hotel company was later organized. The hotel was
 then at least, liquidation or equipment. The liquidation was
 transferred by the hotel company. The liquidation was
 Stevens & Company, a corporation, was organized in the business of
 supplying furniture and equipment for hotels, and of acting as
 January 11, 1920, before the organization of the hotel company.
 limited gave the Stevens Company a contract to build, construct and
 a fee or commission of 10 per cent of the entire cost of the
 which the equipment installed in place, on the Stevens Company
 in effect amounted to \$11,750, the balance being paid by the hotel
 the furniture was ordered by the hotel company. Limited was
 president of the hotel company. The commission amounted to \$11,750
 and was added to the liquidation of the hotel company, on the liquidation
 payment of his stock, and that is the amount now in controversy.
 To pay for the 500 shares of stock limited deposited a
 loan for \$11,750 from said Stevens & Company, for which it
 gave his note, to be secured by deposit of the 500 shares then
 owned. The furniture and equipment were only installed in the

winter of 1921, a few months after the hotel company was organized, and the same were received, accepted and used by the hotel company, and in fact constituted its main assets in the hands of its trustee in bankruptcy.

It therefore appears that instead of advancing Olmsted the amount of the loan in cash said Stevens Company, with his approval as president of the hotel company, paid cash directly to the manufacturers or wholesalers for the furnishings to the amount of \$35,768.51, for which it accounted in detail, and which together with said commission and a cash balance of \$40.49 made up the amount of the loan as well as the subscription price of the stock. This method was adopted as "a short cut or saving in the method of payment, and a matter of bookkeeping," as testified to by H. L. Stevens, a defendant herein and the active agent and president of the Stevens Company, with whom the negotiations were made, all of which were pursuant to the understood arrangements with Olmsted, as president of the hotel company. In other words, instead of Olmsted paying the hotel company in cash for the shares subscribed for, and it in turn paying out the money to the several concerns for the hotel furnishings, the bills therefor were paid by the Stevens Company after they had been submitted^{to} and approved by Olmsted for the hotel company, and they were then charged to him as an advance-ment on the loan and credited through the payments for the furnishings, on his stock subscription. A complete statement of the account showing the actual payments made by Stevens & Company was rendered, and its items are not questioned except as to the charge of such commission. Through these transactions the hotel company ultimately got and accepted the full benefit of the subscription for the 503 shares.

While the methods of dealing are subject to criticism for failure to secure formal action by the directors of the hotel

company there is nothing in the evidence that discloses fraud, or that the prices paid for the furniture and furnishing were not fair and reasonable, or that the dealing for the commission was not customary and for a fair and reasonable amount, or that the hotel company did not as fully and adequately receive the benefit of \$50,300, the subscription price for its shares, as if that sum had been paid directly into its treasury and then paid out in the manner it was.

It clearly appears that it is the custom of the furniture manufacturers not to sell direct to hotels, that negotiations with them are had through a recognized jobber or dealer, that said Stevens Company was such a jobber or dealer, and that the commission received by the jobber is for supervising, designing and furnishing the equipment, and that the commission so paid was customary, fair and reasonable.

There is no proof of the perpetration of any fraud on the hotel company or its creditors in these transactions, either in the organization of the company or in the payment of the subscription for its stock. Any presumption thereof that might obtain because of Olmsted's dual relation at that time as agent of the Stevens Company in promoting the organization of hotel companies, and as president of the hotel company, is fully rebutted by affirmative proof of the fairness and reasonableness of the transactions by which the hotel company received and accepted the full equivalent of the subscription. In view of this fact and the absence of any taint of fraud, to require a second payment of the amount of the commission because of the failure of Olmsted to procure from the directors of the hotel company formal authority for or ratification of the negotiations made by him, which we think it has impliedly ratified, and of which the company has received and accepted the full benefit, does not appeal to us as equitable.

We think we have stated the controlling facts of the case. While Olmsted did not pay his loan from the Stevens Company, we need not follow the transfers of the stock for they in nowise affect the bona fides or validity of the transactions on which payment of the subscription depends.

From this recitation of the salient facts we find no occasion for discussing settled principles of law and equity that may be applicable thereto.

It is urged that under the provisions of the Ohio statute sought to be enforced by the bill, plaintiff has a complete remedy at law. But we need not discuss the contention if, as we hold, the facts of the case do not in any event present a case for equitable relief.

Accordingly the dismissal of the bill is affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

It is a very common mistake to suppose that

the only way to get the best results is to

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It is a very common mistake to suppose that

W. C. BENNETT,
Defendant in Error,

v.

CHARLES L. NICHOL,
Plaintiff in Error.

242 I.A. 642

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error seeks review of a record showing a judgment against him for \$850, entered on the verdict of the jury after going to issue on a statement of claim which alleged in effect an indebtedness for services rendered by plaintiff to defendant in drawing plans and supervising the building of certain structures.

The sufficiency of the pleading is questioned because of an alleged informality as to the kind of action. But the nature of the cause of action, as alleged, was clearly understood, as indicated by defendant's affidavit of merits taking issue thereon, and by waiving the informality, which defendant by so taking issue must be deemed to have done, the pleading was sufficient to sustain the judgment.

But questions with regard either to the pleadings, the rulings thereon, or the evidence, are not properly brought before us. They are raised by statements of counsel not supported by the record. They could be preserved for review only by a bill of exceptions or a stenographic report duly signed before they would become a part of the record. Mere suggestions or statements of counsel in their brief and argument that certain rulings were made on motions, and objections were made to evidence received, and that defendant

was denied an opportunity to amend his pleadings, did not entitle plaintiff in error to a decision thereon. (People v. Cowen, 283 Ill. 308, 312.) The case must be tried upon the record and not on statements made outside of it. (Farmer v. Fowler, 288 Ill. 494, 497; People v. C. L. R. & S. R. R. Co., 286 Ill. 576, 581.) Where there is no bill of exceptions or stenographic report, motions and decisions thereon do not become a part of the record, and it will be conclusively presumed that the action of the court was correct. (Commissioners of Sub-Drain. Dist. v. Carroll, 295 Ill. 482, 485.) The questions argued for reversal, except the sufficiency of the statement of claim to support the judgment, which we have already considered, not being duly preserved for our consideration, the judgment is presumably correct and is affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

LOUIS F. ELVIN,
Defendant in Error.

v.

GEORGE BUCHSTICH,
Plaintiff in Error.

242 I.A. 212

WRIT TO
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARKER DELIVERED THE OPINION OF THE COURT.

Elvin was an assignee of a chattel mortgage given by Buchstich upon an automobile truck to the Red Ball Transit Co., to secure payment of fifteen of his notes for \$200 each, payable to the order of said company. There was a collateral contract between Buchstich and said company whereby it was to furnish him work to a certain amount, from which he was to have credit on said notes to the extent of 50 per cent of his earnings under the contract. Plaintiff introduced in evidence said contract, the mortgage, its assignment to another company, and an assignment by the latter company to Elvin, the notes secured by said mortgage, and the status of the account between the Red Ball Transit Co. and defendant as it purported to stand upon the former's ledger, and rested his case. Defendant objected to the evidence of the account as incompetent and moved for a finding in his favor. The court refused to sustain the motion, and he stood by the same and offered no testimony. Judgment was then entered for plaintiff on the verdict.

It was absolutely essential to the maintenance of his action that plaintiff should make clear proof of his right to possession of the property replevined. It is fundamental in replevin that plaintiff must recover on the strength of his own title. (Pease v. Ditto, 169 Ill. 456.) Such proof he did not

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make. While there was proof of the assignment of the mortgage there was no evidence whatever of his title or right to the possession of the notes or of an assignment of them. They bore no endorsement except the stamp of the company's name, which did not purport to have been placed there by anyone, much less by an authorized named officer of the company. There appeared to have been an endorsement on some of said notes stamped in the name of the company and purporting to be signed by its manager but those endorsements had been erased or cancelled. The notes not being endorsed by the payee, and there being no affirmative evidence of plaintiff's right to their possession or that in fact he was possessed of them, for they were produced in court by the company's manager, he failed to make proof of an essential element of his alleged cause of action. The mere assignment of the mortgage to him did not convey title to the notes. As said in Gaff v. Harding, 48 Ill. 148: "The note is the principal thing, and the mortgage a mere incident * * * . A mortgage cannot exist, as an independent security, in the hands of one person, while the note belongs to another."

Defendant was entitled to a motion for an instructed verdict on failure to prove the alleged cause of action.

REVERSED.

Oridley, P. J., concurs.
Fitch, J., dissents.

MR. JUSTICE FITCH DISSENTING:

As I understand the record, the notes and mortgage were produced by the plaintiff and offered and admitted in evidence without objection to the rubber stamp endorsement. This was sufficient prima facie evidence of plaintiff's title.

242 I.A. 642

PEOPLE OF THE STATE OF
ILLINOIS.

Defendant in Error.

v.

TONY TALLERICO.

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was charged in an information that at the city of Chicago "he did wrongfully and unlawfully and maliciously injure and deface a certain building located at 524 So. Robey street, of the goods and chattels of Josephine Cella of the value of fifteen (\$15) dollars, without the consent of the said Josephine Cella," in violation of section 192 of the Criminal Code.

One of the elements of the criminal charge as defined in said section is that the commission of the act must be without the consent of the owner of the property. There was no attempt to prove either the ownership of the property or the absence of the owner's consent, and, therefore, the evidence was insufficient to sustain a conviction of the statutory offense. Accordingly the judgment will be reversed and the cause remanded.

This conclusion obviates the necessity of considering other alleged errors, which, if they exist, will doubtless be avoided on another trial.

It is urged by the People that the point of the sufficiency of the evidence is not duly preserved. Such a question is open to review on an exception to the judgment

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(Climax Tag Co. v. American Tag Co., 234 Ill. 179, 182.)

and such an exception is preserved by statute without the formality of taking it (Sec. 81 of The Practice Act as amended in 1911; Miller v. Anderson, 269 Ill. 606.) The amendment expressly applies to criminal as well as civil cases.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

CHARLES F. RONEY,
Appellant,

v.

WILLIAM H. HOFFENJANS,
Appellee.

242 I.A. 642

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action to recover rent for the last two months of the term of a lease for one year. After opening up a judgment by confession for plaintiff the case was submitted to a jury on the issue whether there was a concession of those last two months without rent, as claimed by defendant was the intention of the lease. The verdict was for defendant and a judgment of nil expiat was entered.

The lease bears date August 19, 1924, and was signed by the lessee August 23rd. It provides for a lease of the premises from October 1, 1924, to September 30, 1925, and that defendant shall pay "the sum of Seven Hundred Dollars, payable in monthly installments of Seventy Dollars, each in advance, upon the first day of each and every month of said term."

Because of the recognized ambiguity and inconsistency of paying only \$700 in twelve payments of \$70 each, parol testimony was heard. Defendant testified that at the beginning of negotiations on August 19, 1924, Steele, plaintiff's agent, informed him that the price would be "\$70 a month with two months' concession, August and September of 1925, an annual payment of \$700;" and that he called attention to these figures on the face and back of the lease when it was presented for his signature, and that Steele then said, "that was what it meant,"

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and that he was to get the two months' concession in August and September, 1925. Steele denied that there was any conversation about concessions or wherein \$700 was mentioned but that he told him the premises were ready for him from the 19th of August to the first of October, 1924; and plaintiff testified that when he asked defendant in August, 1925, why he did not pay his rent for that month the latter then claimed a concession for that month but that plaintiff told him his concession was from August 19 to October 1, 1924, and that the figures "\$700" were an error.

Defendant admitted Steele told him he was allowed to go into the apartment from the time of the execution of the lease and that it would not cost him anything, and no concession is provided for in the lease. It appears from the rent receipts introduced in evidence that defendant paid \$70 on the first of each month for the first ten months, and that each receipt described the payment as rent of the premises from the first of the month it bore date to the first of the following month.

Either specifying \$700 as the total annual rent was an error, or a crude way of expressing an intention to grant a concession of two months of the specified term without rental. It is hardly likely that experienced as plaintiff and his agent were in preparing leases for his several apartment buildings that either would not have employed more appropriate and definite language to express such an intention, and that they would have recognized the manifest inconsistency in the lease had the provision been brought to their attention when it was drawn. It certainly was not difficult to express the intention to have \$70 paid for only ten months instead of for "each and every month of said term," namely, twelve months, if that was the intention. That there was a mistake in computation is far more plausible than defendant's explanation; and if any concession was talked about

before the lease was drawn it probably related to the privilege given defendant to occupy the premises for nothing from the time it was signed until the term actually began, about a month and a half later. Defendant's explanation is inconsistent not only with the terms of the lease but with the construction put upon it by terms of the receipts he accepted each month for the first ten months. The burden was upon him to show a different understanding from their terms in explanation of the ambiguity, and we do not think it was sustained.

In view of this conclusion we need not discuss the alleged error in refusing a change of venue, although we are not impressed with appellant's argument upon that subject.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

JOSEPH G. JOHNS, Administrator
of the estate of Grace Martha Johns,
Appellee.

v.

THE PEOPLES GAS LIGHT AND COKE
COMPANY.

Appellant.

242 I.A. 642

APPEAL FROM

SUPERIOR COURT.

COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action to recover for the death of a little girl six years old, resulting, as charged in the counts of the declaration on which the case was tried, from negligence in the operation of defendant's truck, and in the failure of its driver to sound a warning signal as he approached the street intersection where the child was run into.

As there must be a reversal of the judgment because of erroneous rulings upon submitted instructions, it will become unnecessary to recite the evidence or pass on the contention that the verdict and judgment were against its weight.

The little girl left as next of kin her parents and two younger sisters. There was no attempt to prove actual damages to the latter. In view thereof defendant offered two instructions, one to the effect that if the evidence does not show that the sisters of the child sustained any pecuniary or money loss by reason of the latter's death, then the jury can only estimate the damages to the sisters at "a nominal sum;" and the other, to the effect that "a nominal sum," as used in that and other instructions, meant one dollar. Both were refused and are not covered by given instructions.

It was held in Rost v. Noble & Co., 316 Ill. 357, a like form of action, in which there was no proof of damages to

342 I. A. 643

JOHN E. JOHNS, Plaintiff,
vs.
THE PEOPLE'S GAS LIGHT AND COAL
COMPANY, Defendant.

STATE OF NEW YORK,
County of New York.

THE PEOPLE'S GAS LIGHT AND COAL
COMPANY,
Defendant.

AND, JUSTICE BARNES delivered the opinion of the court.

This is an action to recover for the value of a little
girl six years old, deceased. The complaint alleges that
defendant on which the gas was used, the defendant in the
operation of defendant's truck, and in the driver of its driver
to commit a criminal offense as he took the child into
custody and the child was injured.

As there must be a recovery of the defendant because of
extensive wrongs upon defendant's truck, it will require
unnecessarily to recite the evidence of facts of the complaint that
the verdict and judgment were against the defendant.

The little girl left in care of her mother and two
younger sisters. There was no attempt to prove actual damages
to the father. In view of the defendant's defense and instructions,
one to the effect that if the evidence does not show that the
sisters of the child sustained any pecuniary loss, then the
loss of the father's death, then the jury can only award the
damages to the sisters of "nominal sum" and the other, to the
effect that "nominal sum," be used in that and other instructions,
which one dollar. Both were refused and the not covered by other
instructions.

a younger brother of the deceased, that it was reversible error to refuse an instruction like the former. It said that while the injury to the parents would be presumed, actual damages to collateral kindred must be proved. Other decisions to the same effect are Rhoads v. C. & A. R. R. Co., 227 Ill. 328, and No. Chi. St. Rd. Co. v. Brodie, Admr., 186 Ill. 317. Failure to give those instructions was reversible error.

There was also error in giving instruction 40 on behalf of plaintiff which directed a verdict of guilty if the jury found particular facts, because it did not contain an element of the cause of action, namely, whether there was the exercise of due care by the parents of the deceased for the protection of the child.

While negligence is not attributable to a child of such tender age it would be to the parents if they failed to exercise such care. There was evidence on that question. That an instructed verdict on particular facts must embrace all the facts essential to the verdict is too familiar law to require citation of authorities. Contributory negligence of the parents is a bar to recovery in such a case (Onnesorge, Admx. v. Chicago City Ry. Co., 259 Ill. 424; City of Chicago v. Starr, 42 Ill. 174), and it will bar the action as to all the other beneficiaries. (Hazel v. Heepston-Danville Bus Co., 310 Ill. 38.)

It is also urged that the motion in arrest of judgment should have been granted because the declaration fails to contain a proper averment of due care. It alleges that the child was six years old and in the exercise of ordinary care for her own safety consistent with her tender age. But as negligence cannot be attributed to a child of that age and it is the recognized duty of the parents to use all reasonable care to protect it from impending perils (Thompson on Neg. Vol. 1, par. 333,) the contention is that the declaration lacks an essential averment to

the cause of action in failing to allege the exercise of such duty by them.

It is a recognized doctrine in this State, since the decision of Walters v. City of Ottawa, 240 Ill. 259, that a declaration in an action to recover for injuries is fatally defective if it fails to aver due care on the part of the plaintiff when he was injured, or conduct or circumstances from which it may be inferred. While perhaps on the principle of strict pleading such an averment would seem to be necessary, and, if necessary, the defect could not be cured by verdict (Walters case, supra, p. 267,) yet in a similar case, I. C. R. & Co. v. Warriner, 229 Ill. 91, where there was no such averment, it was held that it was fairly inferable from allegations similar to those in the counts on which this case was tried, that the accident was not due to negligence or want of care of the parents, and that the issue joined required proof of the omitted fact, and that the defect was cured by verdict.

But for the errors stated the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

JAMES K. SWEENEY,
Appellant,

vs.

FRANK B. DOWLING,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

242 I.A. 643

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

By written contract dated January 4, 1924, the parties hereto agreed to exchange properties, plaintiff to convey real estate in Evanston, and defendant real estate in Chicago, subject, among other things, "to pay all general taxes and special assessments levied for the year 1922." The contract also provided that plaintiff was to pay defendant \$5,000 at the time of delivery of the deeds, and also that "general taxes, interest on incumbrances, insurance, rents, water and electric light bills, etc., to be adjusted as of delivery of deeds *** If the taxes and assessments to be paid by the vendor cannot be paid at time this contract is to be closed then the vendor ^{is} to pay same on or before May 1st next following."

The deeds were delivered and contract consummated on January 18, 1924, by an adjustment whereby defendant was paid \$3,467.09. Just how this precise amount was reached, further than that defendant allowed plaintiff \$1,468.77 for taxes, does not appear. It is apparent, however, that the latter sum was deducted from the required cash payment of \$5,000. That sum was the amount of the general taxes on defendant's property for the year 1922. General taxes for the year 1923, which were paid by appellant in April and July of that year, amounted to \$2,844.12.

This suit is brought to recover the difference between the latter amount and the sum of \$1,468.77, taxes for the year 1922, paid as aforesaid. While the contract expressly

provides that the mutual sales were made subject to the general taxes for the year 1922, it is the contention of appellant, against whom there was a judgment of nili capiat, that in view of the quoted provisions of the contract relative to an adjustment upon delivery of the deeds, that the contract is ambiguous as to what general taxes were to be the subject of adjustment, and that in view of the fact that at the time of the adjustment the taxes for 1923 were not ascertainable and defendant allowed in the adjustment the sum of \$1,468.77 to be applied on taxes for 1923, which was the precise amount of the general taxes for 1922 paid the year before, and that he then and subsequently verbally promised to pay the rest of the general taxes for 1923, the parties gave construction to the contract, and, therefore, plaintiff is entitled to be remunerated for his payment of such difference.

While defendant admitted that he allowed for general taxes for 1923 the amount paid for 1922, he denied any agreement or promise to pay the entire tax for 1923. In view of his categorical denial of any verbal agreement or promise to such effect, as testified to by plaintiff alone, upon whom was the burden of proof, we must look entirely to the admitted facts and the terms of the contract.

It certainly cannot be said, looking to the contract alone, that it is necessarily ambiguous. It may be indefinite as to what taxes were to be adjusted. But in view of the express provision that the conveyances were to be subject to the general taxes for 1922, the provision for an adjustment of taxes might relate to any possible unpaid taxes for previous years. Whether there were any such does not appear. True, the actual allowance of said sum of \$1,468.77 on taxes for 1923 is not in accordance with that theory, nor is it with the language of the contract making the conveyances subject to the general taxes for 1922. The deeds

[illegible]

It is hereby stated that the above information was obtained from the files of the Department of the Interior, Bureau of Land Management, and is being furnished to you for your information.

themselves were not introduced in evidence. They would probably have indicated precisely whether the parties intended that the vendor or the purchaser was to pay the general taxes for 1923, and would have been better evidence of their understanding of the contract. It does not follow from the fact that in the adjustment defendant saw fit to allow on taxes for 1923 the amount of the taxes for 1922, which he had already paid, he was, contrary to his written agreement, obligated or willing to pay the entire amount of the general taxes for 1923. If he made any such verbal promise, which he expressly denies, and which plaintiff would be bound to prove by a preponderance of evidence, there is no evidence of any new consideration to support it.

We do not think that the contract can reasonably be construed to impose any liability of the vendor for the general taxes of 1923, contrary to the express provision on that subject. If there was a mistake in the year it should have been corrected in the deeds. If it can be so construed as to one vendor it must as to the other, and there is nothing in the record to show any adjustment of the taxes for 1923 on the property conveyed by appellant in accordance with such theory. As to the entire controversy in dispute between the two parties relates to a parol agreement inconsistent with a provision of the contract, into which it was merged, it can not be said there is any ambiguity, and we are unable to say that the court's finding and judgment were against the law or the evidence.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

242 I.A. 643

F. J. O'CONNELL,
Appellant.

V.

MYRTLE DOBLE.
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant was the owner of a lease to a certain apartment, of which appellee was the lessee. He was also owner of the entire building. The lease was in writing, under seal, and called for \$100 a month rental until April 30, 1925. Rent was paid until January 1, 1925. The suit is to recover rent for the months of January and February of that year.

The defense made is that appellee vacated the premises and delivered the keys thereof to one Harrison, of the firm of Harrison & Heidy, appellant's agent in December, 1924, on his promise to secure a cancellation of the written lease from his principal. Harrison denied making any such agreement, and even if he did, there is an utter absence of proof of his authority to cancel the lease, or release a tenant from further payments of rent thereunder.

Plaintiff testified that said firm collected his rents and looked after the building for him; that they acted as his agents in connection with the management of the building; that he never authorized Harrison to cancel the lease, and gave no authority to the firm of Harrison & Reidy in writing. There was no attempt to prove any express authority of the agent to release defendant from the further payment of rent, and we find

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APPEAL FROM
ADMINISTRATIVE ORDER
OF COMMISSIONER

T. J. O'CONNELL,
Appellant,
v.
MYRTLE MOBILE,
Appellee.

THE DISTRICT COURT OF THE COUNTY OF

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nothing in the evidence tending to show that plaintiff in any way held out that the agent had such authority.

It was the contention of defendant that pursuant to a prospective rental of the entire building, to be remodeled for a boarding house, Harrison induced defendant to move out of the premises in December, 1924, into an apartment in another building which she purchased through him, with the promise that he would have her lease cancelled, and that she accordingly surrendered, and he accepted, possession of the premises in December, 1924. He denied making such an arrangement. It was incumbent on defendant to establish her affirmative defense by a preponderance of evidence, and in that connection to prove the agent's authority to enter into such an arrangement. We think in the absence of proof of the agent's authority, either express or implied, the verdict for defendant was against the weight of the evidence, and the court erred in not granting a new trial.

REVERSED AND REMANDED.

Gridley, F. J., and Fitch, J., concur.

nothing in the evidence leading to such that would be any
any help out from the state and authority.
If the investigation of the state is to be successful, it
prosecutive counsel of the state, it is to be remembered that
a promising future, however, it is to be remembered that
promises in December, 1911, that an agreement in writing
which was presented through him, with the promise that he would
have his name removed, and that was a promise which was
and he accepted, however, of the promise in December, 1911,
he denied making such an agreement. It was found that he had
in the evidence of the state, it is to be remembered that
evidence, and in the evidence of the state, it is to be remembered
to enter into such an agreement. It is to be remembered that
proof of the state's evidence, which is to be remembered that
verdict the defendant was found guilty of the crime,
and the state was to be remembered that it was a crime,
EVANS AND COMPANY.

EVANS, J. J., and JAMES, J., counsel.

MICHAEL FOX,
Appellee,

v.

CHARLES PFANDER,
Appellant.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree setting aside the sale of a store and fixtures therein from defendant to complainant, and ordering the repayment of \$1,000 cash paid thereon, and the cancellation of chattel mortgage notes in the amount of \$500, representing the balance of the purchase price.

It was stipulated at the trial that if complainant was entitled to rescind, then he was entitled to his money, and that that was the only issue. The decree finds that he was entitled to rescind by reason of material fraudulent representations made to induce the sale, and relied upon, to the effect that the daily sales for said store were averaging \$35 to \$40 a day, and that the store was making a profit of \$400 a month, whereas, during the period that defendant operated the same the daily sales averaged from \$15 to \$18 a day, and did not make a profit of \$400 a month but lost \$125.

We need not discuss the evidence on this feature of the case as the court's findings are amply sustained by the evidence.

But it is urged that the decree takes no account of evidence of defendant pertaining to the value of the stock in the store which became, as alleged in the answer, a part of the consideration price. We think that issue was eliminated

by the stipulation.

It is further urged that complainant, about 20 days after taking possession, advertised the property for sale, stating that it is "worth \$3,000, clears \$300 mo." Two days before inserting this advertisement complainant said to defendant: "With the amount of stuff in this place, how could you claim to make \$35 to \$40 a day. I cannot make \$15 a day." Thereupon defendant said: "Why don't you put an ad. in the paper and sell it." The ad. was practically like that of defendant's which called the property to complainant's attention. As this resort to a method of getting rid of a poor bargain was at defendant's instance, and as, so far as the evidence shows, complainant made no other attempt to sell, but on the contrary, after learning in one month's trial that his average sales were only about \$15 a day, rescinded the contract because of such misrepresentations, we think defendant is in no position to take advantage of complainant's advertisement, which he manifestly suggested to lull complainant into a sense of security and belief that he might thus get rid of the property without a loss. We think defendant is estopped from invoking the rigid rule of waiver which might apply if, in such matter, as said in Hegenaar v. Dechow, 33 App. Div. (N. Y.) 12, the vendee had been uninfluenced in so doing by the actions of the vendor. Such advertisement is the only act of complainant relied on to support the doctrine of waiver. In the cases cited by defendant other more decisive acts were present which were clearly inconsistent with the right of rescission.

On the facts thus stated we do not think defendant could invoke the doctrine. Accordingly the judgment is affirmed.

AFFIRMED.

Idley, P. J., and Fitch, J., concur.

EDGEWATER EOND & REALTY CO.,)
Appellee,)

vs.)

ROBERT A. GUARNO,)
Appellant.)

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

242 I.A. 643

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff and defendant are real estate brokers. The latter gave the former descriptions of properties listed with him for sale upon the understanding that he was to pay plaintiff one-half the commission if the former procured a customer on certain submitted terms.

On a trial without a jury there was a judgment against defendant for \$1140.

We need consider no other question than whether plaintiff was shown to be the procuring cause of the sale. On that question we think the court's finding was against the weight of the evidence.

Plaintiff's salesman, Solomon, undertook to effect a contract of sale with Mrs. Lobelson of a flat building included in the list given. The list price was \$80,000, but defendant represented that the owner might take less. Mrs. Lobelson signed a contract for the same at a purchase price of \$76,000, and gave an uncertified check to plaintiff's order for \$1,000 as a payment down. This contract was in the nature of an offer to be accepted by defendant, who declined to submit the same to the owner of the property, who was in California, unless the check was certified, as seems to have been the recognized local custom in such cases. Mrs. Lobelson was unwilling to have the check certified before the seller signed the contract. When so told defendant again declined to take any further steps until the check was certified and put in his hands as

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As to these essential facts there seems to be no material disagreement. The date of the contract and check was November 14, 1923. The conversations with regard to the same took place within ten days thereafter. The contract expressly provided that it would become null and void if not signed by the owner on or before five days from November 20, 1923. On account of the failure to comply with defendant's demand for depositing a certified check for the earnest money he would not receive the contract or check and did not submit the offer to his client. Mrs. Lobelson then withdrew her offer and requested back her contract and check, and plaintiff undertook through the same agent to sell her other property. Up to that time she had not met defendant or he, her. Neither knew or had met the other. She did not know he was the agent for the property and he did not know that she was the proposed purchaser. Later she saw an advertisement by defendant in the Chicago Tribune about December 4, 1923, and went to his office. His salesman first showed her several pieces of property and finally that in question. This resulted in her closing a deal therefor at the price of \$75,000.

The greater weight of the evidence is to the effect that prior to seeing the "ad." neither she nor the defendant had either heard or knew of the other. Defendant was not apprised that she was the party to the offer submitted by plaintiff until after the sale, and she did not know of his agency for the property before she went to his office.

From such evidence we do not think plaintiff's efforts were the proximate cause of the sale, or that he was entitled to any commission defendant may have received, although there is no proof that he received any, which it was apparently incumbent upon plaintiff to make under his statement of claim.

Regardless of any other question the judgment must be reversed and the cause remanded for the reasons stated.

REVERSED AND REMANDED.

Gridley, P.J., and Fitch, J., concur.

THE NATIONAL CASH REGISTER
COMPANY, a Corporation,
Appellee,

vs.

CLYDE W. RILEY ADVERTISING
SYSTEM, a Corporation, and
BERNARD W. SNOW, Bailiff,
Appellants.

242 I.A. 643

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a proceeding under the statute (Ch. 79, Art. XIII, Canill's Stat.) for the trial of right of property to two cash registers held, as alleged in the statement of claim, under the levy of an execution issued in a case in which the defendant, Clyde W. Riley Advertising System, was plaintiff and Chas. Weeghman defendant.

Appellee's claim is based on the contention that Weeghman individually was the real purchaser of the registers and as such executed a chattel mortgage on each to the plaintiff.

It appears that Weeghman personally executed a written order on plaintiff for each register, signing it "Carol's Inc. By Chas Weeghman," and also a chattel mortgage on each, signing it "Carol's Inc. (Seal) Chas. Weeghman."

The mortgages were executed on a printed form containing the word "Seal" in print. They do not purport to bear a corporate seal.

The acknowledgment of the mortgages reads: "This mortgage was acknowledged before me by the within named Carol's Inc. Chas. Weeghman by G. C. Miller, his attorney in fact," etc., and accompanying power of attorney appointing Miller attorney in fact for such purpose reads: "I, Carol's Inc., Chas. Weeghman, the mortgagor, do hereby make and appoint G. C. Miller, my

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At present, the only person who is known to be in the country is the one who is known to be in the country. The only person who is known to be in the country is the one who is known to be in the country.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States.

attorney in fact," etc., and is signed "Carol's Inc. Mortgagor Chas. Weeghman." The notary taking the acknowledgment certifies that "Carol's Inc.-Chas. Weeghman, personally known to me to be the same person whose name is subscribed to the foregoing instrument, *** appeared before me this day in person and acknowledged that he signed," etc., "as his free and voluntary act," etc.

The notes secured by the mortgages are signed "Carol's Inc. By Charles Weeghman." The forms of the mortgages are those employed and adapted for use by individuals and not corporations. The italics in the quotations are ours.

Plaintiff called its salesman who acted for it in the negotiations, who stated that the several documents were signed by Weeghman in his presence, and that when the papers were made out he asked Weeghman where he got the name "Carol's Inc." and he replied that it was his wife's first name and that was why he "called it Carol's." On his testimony and the introduction of the documents aforesaid in evidence plaintiff rested his case, and defendant did likewise without offering any proof.

Appellants contend that plaintiff's evidence is insufficient to prove that it had title to the property. It is argued that the transactions purport to have been made with a corporation and that, therefore, the mortgages were not properly executed and acknowledged and are void as to third persons. The conclusion would be correct if the transactions should be so construed. But if the mortgages were given by Weeghman as an individual then there is no defect which would render them void, and the authorities that a chattel mortgage not executed, acknowledged and spread of record in conformity with the statute has no effect upon the rights of third persons, have no application to the facts of the case. It will not be questioned that chattel mortgages being in derogation of the common law must be strictly

construed. (Kimball Co. v. Polakow, 268 Ill. 344; Lyons v. Peoples Bank of Lexington, 317 id. 44.) If in the absence of any proof or presumption of the existence of such a corporation we reject the words "Carol's Inc." as mere surplusage or treat the same as a mere name under which Weeghman apparently did business, there is no difficulty in regarding the transactions as entered into by Weeghman in his individual capacity. Supporting this inference is the fact that the parties employed the form designed for use by an individual. The only feature supporting the contrary inference is the use of the abbreviation "Inc." which commonly denotes an incorporation. But nowhere else in the instruments is there any recital, language or reference to indicate that the name is one of an actual corporation or that the transactions were with one. Under such a state of facts we think the most plausible inference is that "Carol's Inc." denotes a name by which Weeghman did business and not a corporation. So construed the instruments are not so defective as to be void as to third persons.

We think the evidence affords prima facie proof of title in plaintiff under the mortgages, and that it was not rebutted by proof of the existence of a corporation by that name, and do not think
 / that the mere use of the name "Carol's Inc." as aforesaid constitutes proof of a transaction with a corporation.

While not proof in the case it is significant that the Riley Advertising System took the same view when it levied on the property as Weeghman's.

The judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

The National Cash Register Company, appellee, v. Clyde W. Riley
Advertising System and Bernard W. Snow, bailiff, appellants. Gen. No.
31,042.

242 I.A. 643

proceeding for trial of right of property. Judgment fo
plaintiff.

Error to the Municipal Court of Chicago;
Appeal from the Superior Court of Cook county;
Circuit Court of county;
County Court of county;
he Hon. Judge, presiding. Heard
n the division of
this court at the term,

Affirmed
Reversed
Reversed and remanded with directions.

Opinion filed Rehearing denied

for appellants.

for plaintiffs in error.

for appellees.

for defendants in error.

PRESIDING JUSTICE

delivered the opinion of the court.

THE NATIONAL CASH REGISTER
COMPANY, a Corporation,
Appellee.

1992

CLYDE W. RILEY ADVERTISING
SYSTEM, a Corporation, and
BERNARD W. SNOW, Bailiff,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

242 I.A. 643

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a proceeding between the same parties, involving a like state of facts and the same questions, as in case No. 31041, in which we have this day filed an opinion confirming a judgment in favor of plaintiff's claim of title to two cash registers covered by two chattel mortgages.

The claim in the case at bar is made for two other cash registers covered by chattel mortgages executed by the same mortgagor, in like form in every respect.

What we said in that opinion is applicable to and decisive of this case. For the reasons there stated the judgment in this case is affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

J. P. SULLIVAN,
Appellee,

v.

HARRY L. HARRIS et al.,
Appellants.

242 I.A. 644

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment on a verdict for \$1,000 for damages resulting from a collision of defendants' automobile with plaintiff's auto-truck in the southeasterly portion of the intersection of 22nd street and Prairie avenue, Chicago. The street runs east and west, and the avenue north and south. Plaintiff's auto-truck was going east on the south side of the former at a speed between 8 and 17 miles an hour, and defendants' truck was going south on the latter at about twice that speed, swerving to the southeast just before the collision.

That plaintiff's truck reached the intersection as soon as, if not before, defendants' car reached it and had the right of way both by usage and law can hardly be questioned.

Appellants make two points; (1) that defective brakes on plaintiff's truck contributed to the injury, for which we think there is no real support in the evidence, and (2) that the judgment improperly includes alleged damage for loss of the use of plaintiff's truck while he was waiting for a new body to be built on another truck ordered to replace the damaged truck.

It appears that the truck was not repaired but sold in its injured condition. In that ^{case} plaintiff was entitled to recover what would have been the fair and reasonable cost of repairing it. The man who bought it estimated such cost at

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(continued from page 6)

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Figure 1. The effect of the concentration of the solution on the adsorption of the dye.

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\$1,000. Another witness fixed it at \$300. The specific damage alleged in the statement of claim is \$320 for repairs and \$180 for loss of the use of the truck. There was no proof of the time it would reasonably take for making the necessary repairs. The time it took to construct a new body on the substituted car had no tendency to show what would be the necessary time for repairing the damaged truck. Hence evidence of the rental cost of another car during that period of construction was not competent and should not have been received over defendants' objection.

As recovery could be had for only such damages as were claimed and proven, and the claim for necessary repairs was for only \$320, which the proof amply supports, the judgment is affirmed for \$320 if plaintiff remits \$180 within ten days herefrom. Otherwise the judgment will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR OF \$180.

Gridley, P. J., and Fitch, J., concur.

11.0000. Another witness lived at 11.0000. The opposite of the
 alleged in the statement of claim is that the witness was 11.0000
 for loss of the use of the right. There was no loss of the right
 it would reasonably like for certain and necessary regular. The
 claim is based on the fact that the witness was 11.0000 and had
 no tendency to show that would be the necessary claim for regular
 the damage done. There was no loss of the right of the witness
 for setting that period of consideration was not considered for
 should not have been received over the witness' objection.
 A necessary could be that for only when damages are made
 obtained and received, and the claim for necessary regular and the
 only 11.0000, which the witness could not, the judgment is
 sufficient for 11.0000 if the witness were 11.0000 and the
 relevant. Objections and judgment will be reversed and the
 cause remanded.

TESTIMONY IN DISMISSAL OF 11.0000.

Ordinary, 11.0000, and 11.0000, 11.0000.

31173

VENEER LUMBER & PLYWOOD COMPANY,
a corporation,
Appellee.

v.

MORRIS JOSEPH, HARRY JOSEPH and
JOSEPH BROS. LUMBER COMPANY,
a corporation,
Appellants.

242 I.A. 644

INTERLOCUTORY

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory injunction granted on the bill of complaint after notice of motion therefor, to which certain affidavits in opposition were filed by appellants. But they will not be considered as they were improperly filed in the absence of any plea or answer filed by appellants. No plea or answer having been filed the question whether a temporary injunction should issue was to be determined solely by the sufficiency of the complaint. (Dunns v. County of Rock Island, 273 Ill. 53, 58.) Hence no demurrer to the bill was necessary, as contended by appellee to question its sufficiency. Dictum to the contrary in Young v. Fed. Un. Surety Co., 123 Ill. App. 278, cited by appellee and decided before the Dunns case, supra, is not in harmony with the decision of the Supreme Court on that point.

The bill was filed by a minority stockholder of a corporation seeking the cancellation of a lease to the latter by defendant, and to restrain the latter from enforcing certain judgments for rents rendered upon said lease.

The point made is that in the absence of any showing in the bill of a demand by complainant upon the directors of the corporation of which it is a stockholder to bring suit,

and of a refusal on their part to do so, appellee has no standing in a court of equity for the maintenance of the suit. Such a demand was held to be essential to maintain a bill by stockholders to proceed in the right of the corporation in Wabcock v. Farwell, 245 Ill. 14, and the principle is fully discussed in Perry County v. Stebbins, 66 Ill. App. 427, 430, holding that the failure or refusal of the corporation to demand redress is a condition precedent to the right of the share holders to sue or appear as plaintiffs, unless a state of facts is alleged which makes it apparent that such a demand would be futile. There are no allegations of that character in this bill. It would, therefore, be fatally defective on a hearing whether demurred to or not. (id.) But it would not be proper to dismiss the bill for that reason, as it may be amended. (Dunne case, supra.) This conclusion renders it unnecessary to consider other points argued. Because of the insufficiency of the bill the order will be reversed.

REVERSED.

Gridley, P. J., and Fitch, J., concur.

J. P. SULLIVAN,
Appellee,

v.

HARRY L. HARRIS et al.,
Appellants.

}
} APPEAL FROM MUNICIPAL COURT
} OF CHICAGO.
}

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment on a verdict for \$1,000 for damages resulting from a collision of defendants' automobile with plaintiff's auto-truck in the southeasterly portion of the intersection of 22nd street and Prairie avenue, Chicago. The street runs east and west, and the avenue north and south. Plaintiff's auto-truck was going east on the south side of the former at a speed between 8 and 17 miles an hour, and defendants' truck was going south on the latter at about twice that speed swerving to the southeast just before the collision.

That plaintiff's truck reached the intersection as soon as, if not before, defendants' car reached it and had the right of way both by usage and law can hardly be questioned.

Appellants make two points; (1) that defective brakes on plaintiff's truck contributed to the injury, for which we think there is no real support in the evidence, and (2) that the judgment improperly includes alleged damage for loss of the use of plaintiff's truck while he was waiting for a new body to be built on another truck ordered to replace the damaged truck.

It appears that the truck was not repaired but sold in its injured condition. In that ^{case} plaintiff was entitled to recover what would have been the fair and reasonable cost of repairing it. The man who bought it estimated such cost at

\$1,000. Another witness fixed it at \$800. The specific damage alleged in the statement of claim is \$820 for repairs and \$180 for loss of the use of the truck. There was no proof of the time it would reasonably take for making the necessary repairs. The time it took to construct a new body on the substituted car had no tendency to show what would be the necessary time for repairing the damaged truck. Hence evidence of the rental cost of another car during that period of construction was not competent and should not have been received over defendants' objection.

As recovery could be had for only such damages as were claimed and proven, and the claim for necessary repairs was for only \$820, which the proof amply supports, the judgment is affirmed for \$820 if plaintiff remits \$180 within ten days herefrom. Otherwise the judgment will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR OF \$180.

Gridley, P. J., and Fitch, J., concur.

COSTA A. PANDALEON et al.,
Appellees,

v.

ANDREA RUSSO, etc.,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

242 I.A. 644

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$4476.34 in plaintiffs' favor entered upon a directed verdict.

The plaintiffs' claim is based upon a written contract, made in September, 1920, between plaintiffs and the defendant, by which defendant purchased of the plaintiffs 1000 boxes of Smyrna black raisins at twenty-one cents per pound, to be shipped from Smyrna in September and October, 1920, the quality of which should be like that of "the 100 boxes recently delivered, guaranteed however not to be fermented or sugared." The plaintiffs' statement of claim alleges that in December, 1920, "plaintiffs, with the consent of the defendant, appropriated to the use of the defendant for delivery under the contract, 1000 boxes of Smyrna black raisins, of a quality like that of the 100 boxes theretofore delivered by plaintiffs to defendant," of which it delivered 300 boxes, "and at the request of the defendant retained the remaining 700 boxes of said raisins and held the same for defendant;" that after examination of the raisins in the 300 boxes, defendant accepted, retained and paid for the same; that thereafter plaintiffs delivered the remaining 700 boxes to defendant, "by transmitting to him a delivery order covering the same," but that defendant, though often requested,

refused to pay for the same, whereupon plaintiffs notified defendant the 700 boxes were being held by plaintiffs as bailees for defendant. The amount claimed to be due is the contract price of the last mentioned 700 boxes, with interest thereon from February 13, 1921.

Defendant's second amended affidavit of merits admits the execution of the written instrument upon which plaintiffs' claim is based, but denies that there was any appropriation by plaintiffs to the use of the defendant of any raisins of a quality like that of the 100 boxes previously delivered by the plaintiffs to the defendant, denies that the defendant ever consented to any such appropriation, denies that defendant requested plaintiffs to retain the 700 boxes referred to in plaintiffs' statement of claim, denies that defendant accepted the 300 boxes of raisins therein mentioned, and denies that plaintiffs ever delivered to defendant the seven hundred boxes of raisins for the price of which this suit is brought. The affidavit affirmatively alleges that prior to September, 1920, defendant purchased of the plaintiffs a sample lot of 100 boxes of Smyrna black raisins, which were delivered to defendant in August, 1920, and were accepted and paid for, whereupon plaintiffs offered to sell defendant a further lot of 1000 boxes of the same kind of raisins, representing and warranting that the quality thereof should be the same as that of the sample lot of 100 boxes; that on December 29, 1920, plaintiffs tendered 300 boxes of raisins "as partial fulfillment of the undertaking of the plaintiffs to sell and deliver to the defendant the 1000 boxes of raisins as above set forth;" that upon inspection thereof by the defendant, the raisins so tendered were found to be and were, in fact, unlike, in kind and in quality, the raisins contained in the 100 boxes of raisins previously delivered, and were rejected by defendant; that plaintiffs were notified of such

rejection, and requested to remove the same from defendant's premises, which plaintiffs refused to do, whereupon defendant sold the same for the best available price and credited the proceeds on account of an indebtedness of plaintiffs to defendant by reason of a payment that was made by mistake; that at the same time, defendant notified the plaintiffs that he would not accept the remaining 700 boxes, but notwithstanding such notice, plaintiffs thereafter tendered to the defendant 700 boxes of raisins, which were not like, in kind or quality, the raisins contained in the sample lot of 100 boxes, and defendant refused to receive or accept the same.

Upon the issues made by the plaintiffs' statement of claim and the defendant's affidavit of merits, there was a jury trial. The evidence was voluminous, and defendant's brief in this court points out many alleged errors, which are argued at length by counsel for the parties. After a careful study of the evidence, however, we think it is clear that regardless of other alleged errors, the judgment must be reversed and the cause remanded because there is evidence in the record fairly tending to sustain the defense set forth in the affidavit of merits.

In Wolf v. Chicago Sign Printing Co., 233 Ill. 501, a judgment rendered upon a directed verdict for the plaintiff was reversed and remanded because a controverted question of fact was involved on which the evidence was conflicting. The court there held that a motion to direct a verdict raises only a question of law "as to the legal sufficiency of the evidence to sustain a verdict against the party making the motion," that upon such a motion, the court is not authorized to weigh conflicting evidence and decide disputed questions of fact in issue, but that the parties are entitled to the verdict of a jury upon the controverted questions of fact in the case. The

main defense interposed in this case is that the boxes of raisins, for the price of which this suit was brought, were not of the kind and quality of raisins specified in the contract; and there is evidence fairly tending to prove that defense. The court was not authorized to decide that disputed question of fact, but the defendant was entitled to the verdict of the jury on that question, and it was therefore error to direct a verdict for the plaintiffs.

While our conclusion in this respect necessarily requires that the cause be remanded for a new trial, we may properly add that we think there is no force in defendant's contention that the alleged contract was not mutual.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

main purpose of the report is to show that the evidence
for the guilt of the defendant is not sufficient to
and that the evidence is not sufficient to show that the
defendant is not guilty. The evidence is not sufficient
to show that the defendant is not guilty. The evidence
is not sufficient to show that the defendant is not guilty.
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While the evidence is not sufficient to show that the
defendant is not guilty, the evidence is not sufficient
to show that the defendant is not guilty. The evidence
is not sufficient to show that the defendant is not guilty.
The evidence is not sufficient to show that the defendant is not guilty.

Griffin, W. L. and others, W. L. Griffin.

JOHN A. CORBOY et al.,
Appellees,

v.

ISABELLE CORBOY GRAHAM,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

242 I.A. 644

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

By the terms of the last will and testament of Michael J. Corboy, deceased, the residue of his property, except certain articles of personal property given to his wife, after the payment of debts, funeral expenses and the costs of administration, was devised to trustees, to hold and manage, to collect the rents, issues and profits thereof, to pay over the entire net income to his wife during her life, and within five years thereafter, to dispose of the property and distribute the proceeds among his children as therein directed. The trustees were given specific power to sell and convey, or lease, any part of the real estate, and, generally, to manage and control the trust estate "in their absolute discretion and without limitation as to the character thereof, with all powers with regard to said property and any investments or reinvestments, and the management and control thereof, that I myself would have in person were I then living, until the final distribution and payment thereof as hereinafter mentioned."

The testator died in 1919. In October, 1924, the trustees filed their bill in the Superior court of Cook county praying for a construction of the will as to their power to lease certain of the testator's real estate for a period of thirty years, which might extend beyond the period fixed by the will for the final distribution of the trust estate.

JOHN A. HANCOCK & CO.,
ATTORNEYS AT LAW

V.

ESTATE OF JOHN A. HANCOCK & CO.,
DECEASED.

WILL TESTED
IN THE
COURT OF
COMMON PLEAS
FOR THE COUNTY OF
MICHIGAN

448 A. 844

WILL TESTED AT THE COURT OF THE COUNTY OF MICHIGAN.

By the terms of the last will and testament of deceased J. Corbett, deceased, the residue of his property, except certain articles of personal property given to his wife, after the payment of debts, funeral expenses and the cost of administration, was devised to trustees, to hold and manage, so that the income to issue and profits thereof, to pay over the entire net income to his wife during her life, and within five years thereafter, to dispose of the property and distribute the proceeds among his children as therein directed. The trustees were given specific power to sell any money, or lands, or any part of the real estate, and, generally, to manage and control the trust estate in their absolute discretion and without limitation as to the character thereof, with all power with regard to said property and any investment or reinvestment, and the management and control thereof, that I myself would have in person were I then living. Until the final distribution and payment thereof as hereinafter mentioned.

The testator died in 1918. In October, 1924, the trustees filed their bill in the superior court of Cook county praying for a construction of the will as to their power to issue certain of the testator's real estate for a period of thirty years, which might extend beyond the period fixed by the will for the final distribution of the trust estate.

The bill stated that the trustees had received an offer from the United Cigar Stores Company of America for such a lease, at a rental averaging \$13,500 per year, the lessee to expend \$40,000 on the property during the first year for improvements and to pay all taxes and assessments during the term, but that the trustees were doubtful as to their power to execute such lease.

Later, an amended bill was filed, omitting all allegations as to the offer of the United Cigar Stores Company, and praying for a construction of the will as to the power of the trustees to lease all or any part of the real estate. All the parties interested were made defendants, and after guardians ad litem had been appointed for the minor defendants and answers of all the defendants had been filed, and replications thereto, a hearing was had and a decree entered finding that the proper construction of the will with respect to the powers and authority of the trustees to lease the trust property "is that the trustees are empowered to lease from time to time, and for any number of years, the whole or any part of the trust property, and upon such terms and at such rentals as to the trustees, their survivor or survivors, or their successors in trust, shall be deemed proper."

No appeal was prayed from that decree. Six days after it was entered, Isabelle Corboy Graham, a daughter of the testator and one of the devisees under his will, filed a cross-bill, by leave of court, stating that seven days before the decree was entered, a broker representing one Samuel Donian made a written offer to the trustees to take a lease from them of the same property, to run ninety-nine years, at a rental of \$15,000 a year, the lessee to pay all taxes and assessments "and to spend at least \$100,000 in improving the property, the improvements to revert to the estate at the end of the term of the lease." The cross-bill further states, on information and belief, that Donian is a man

The Bill stated that the trustees had received an offer from the United States Storage Company of twenty-five acres of land, valued at \$1,000 per acre, the terms of which were to pay on the property during the first year for improvements and to pay all taxes and assessments during the term, but that the trustees were doubtful as to their power to accept such offer.

Thereafter, an amended bill was filed, setting out the following as to the offer of the United States Storage Company, of making for a consideration of the bill as to the power of the trustees to lease all or any part of the well located, all the land situated in the town of Belvidere, and with reference to which had been offered for the minor elements and amount of all the land situated and located, and application therefor, a hearing was had and a decree entered finding that the proper consideration of the bill with reference to the power and authority of the trustees to lease the land property in that the trustees were empowered to lease the land for any number of years, the whole or any part of the trust property, and upon such terms and conditions as to the trustees, their survivors or assigns, or their successors in trust, shall be deemed proper.

The appeal was argued from the report. Six days after it was entered, Justice Henry O'Connell, a majority of the court, and one of the business members of the bill, filed a dissenting opinion, stating that seven days before the decision was entered, a broker representing the United States Storage Company, to the trustees to take a lease for ten years at the rate of \$1,000 per acre, of a tract of 25,000 acres, and to agree to pay all taxes and assessments during the term, and to agree to pay \$100,000 in improving the property. The improvement in a year to the estate at the end of the term of the lease. The majority opinion was, on information and belief, that the bill was

of large responsibility and able to carry out the terms and conditions of such proposed lease, and that the cross-complainant is informed and believes that the offer of Donian is a better offer than that of the United Cigar Stores Company; but that notwithstanding the Donian offer, the trustees are intending to, and will, unless restrained by the court, enter into the lease proposed by the United Cigar Stores Company. The cross-bill prays that the trustees may be enjoined from entering into the thirty-years' lease and may be directed to accept the offer of Donian for a ninety-nine-years' lease. The court sustained a general demurrer to the cross-bill and dismissed it for want of equity, and the cross-complainant appeals from that order.

In the brief and argument of appellant it is contended that the trustees have no power to lease "beyond the term of the trust, unless there is some exigency upon which a court of chancery authorizes such lease." We are of the opinion that appellant is not in a position to make this contention in this court at this time. She was a party to the original proceeding and is bound by the decree entered after a full hearing in which she participated. If she was not satisfied with the original decree, she should have appealed from it, and not having done so, cannot be heard on this appeal from the subsequent order.

The only remaining contention is that the regulation and enforcement of trusts is one of the inherent powers of a court of equity. Conceding that to be true, the principle has no application to the facts of this case. The general rule is that where a discretionary power is conferred upon trustees by will, and the power is exercised in good faith, without fraud or collusion, a court of equity will not review or control it. (Crozier v. Hoyt, 97 Ill. 23, 31; Dickson v. New York Biscuit Co., 211 Ill. 468, 487; 2 Ferry on Trusts, § 510 & 511.) "To do so would be to substitute the discretion of

of the responsibility and while a party and the women and
constitutions of such proposed laws, and that the proposed law
is intended and believed that the effect of which is a better
other than that of the United States; but that
notwithstanding the Senate's offer, the Senate has declined to
and will, unless restrained by the Senate, enter into the same
proposed by the United States, before Congress, the cross-bill
provides that the trustees may be appointed from among the
thirty-year, and may be elected to serve the term of
thirty-year, and may be elected to serve the term of
general authority to the cross-bill and intended to the end of
equity, and the cross-commissioners shall from that moment

In the brief and summary of evidence it is contained
that the trustees have no power to issue "bills" and that the
trust, which is now existing which is a matter of
concern to the public, "by the act of the Senate" that
appeal is not in a position to make this condition in this
court at this time. The act of the Senate is in this
and is bound by the Senate's action after a full hearing in which
the participation. If the act is not satisfied with the original
decision, the Senate have expressed their view, and not leaving any
cannot be held on this appeal from the Supreme Court.

The only remaining question is that the trustees
and enforcement of trusts in order to enforce the principle of a
court of equity. Assuming that to be true, the principle is
we apply to the facts of this case. The general rule
is that where a discretionary power is conferred upon trustees
by will, and the power is exercised in good faith, without fraud
or collusion, a court of equity will not review or control it.

the court for that of the trustee." (26 R. C. L. 1373, § 234.) There is no charge in the cross-bill of bad faith, or fraud, or collusion, and no facts from which either would necessarily appear. A comparison of the lease offered by the Cigar Stores Company with what is alleged in the cross-bill to be the offer of Denian, does not show that if the trustees accept the first offer and reject the second they are guilty of bad faith, or fraud, or collusion, or arbitrary and unreasonable exercise of power. In the absence of any such showing the demurrer was properly sustained and the cross-bill dismissed.

ORDER AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

WLADYSLAW JUCHNIEWICZ et al.,
Appellees,

v.

ERWINE E. COWEN et al.,
Appellants.

242 I.A. 644

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Municipal court denying the motion of defendants to vacate a judgment entered against them by confession.

The affidavit filed in support of the motion states that in May, 1925, a contract was drafted providing for an exchange of certain real estate owned by plaintiffs for other real estate owned by defendants and one Wolf Cowen; that the contract was signed by all the parties thereto except Wolf Cowen, who was not present when the others signed the contract and plaintiffs undertook to procure his signature to the same, it being understood and agreed that the contract should not become a binding obligation on any of the parties until he signed it; that it was agreed that each party to the contract should execute and deliver to the other a judgment note for \$1000. to be held as security for the faithful performance of the contract and to be forfeited as liquidated damages in case of default; that defendants executed and delivered to plaintiffs their note in accordance with this agreement, which is the note on which judgment was confessed, but that plaintiffs never executed their note and never procured the signature of Wolf Cowen to the contract, nor did plaintiffs furnish defendants and Wolf Cowen with an abstract of title or merchantable copy

SECRET

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DATE 10-10-00 BY 1045

REASON FOR DECLASSIFICATION

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EXEMPT FROM AUTOMATIC DECLASSIFICATION

THIS DOCUMENT CONTAINS INFORMATION OF A SECRET NATURE

It is the policy of the Department of Defense to release information to the public in accordance with the provisions of the Freedom of Information Act, 5 U.S.C. 552, and Executive Order 11652, as amended.

The information contained herein is classified "Secret" because its unauthorized disclosure could result in the identification of sources, methods, or equipment of the Department of Defense.

That in May, 1964, a contract was awarded to the General Electric Company for the development of a new type of aircraft engine. The contract was for the design, development, and construction of a prototype engine.

Work on the engine was started in May, 1964. The first test run was made in November, 1964. The engine was found to be capable of operating at a power output of 10,000 horsepower.

It is being developed and manufactured by the General Electric Company.

Because of the importance of this information, it is being classified "Secret".

Should anyone be asked to disclose this information, he should refer to the instructions on the back of this document.

Since it is the policy of the Department of Defense to release information to the public in accordance with the provisions of the Freedom of Information Act, 5 U.S.C. 552, and Executive Order 11652, as amended.

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thereof as provided by the contract; that none of the defendants had any knowledge that judgment had been confessed on their note until six days before defendants made their motion to vacate and for leave to defend the suit on its merits.

The rule is well settled in this state that courts of law exercise equitable jurisdiction over judgments by confession, and where a meritorious defense is shown within a reasonable time after the judgment is entered, it has become the settled practice to open the judgment and allow the defendants to plead to the merits, allowing the judgment, however, to stand as security until a hearing on the merits has been had. (Lake v. Cook, 15 Ill. 353; Condon v. Besse, 86 Ill. 159; Gilchrist Transportation Co. v. Northern Grain Co., 204 Ill. 510.)

We are of the opinion that the court erred in denying the motion to vacate the judgment on the showing that was made. The order is therefore reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED.

Gridley, F. J., and Barnes, J., concur.

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PEOPLE OF THE STATE OF
ILLINOIS.

Defendant in Error.

v.

DAVID SREELY and DANIEL J. DENNEHY,
Plaintiffs in Error.

242 I.A. 645
ERROR TO

CRIMINAL COURT,
COOK COUNTY.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Defendants were convicted, in the Criminal court, of the crime of extortion "in manner and form as charged in the indictment in this cause." The only two counts of the indictment which charge extortion allege that defendants unlawfully and maliciously threatened to accuse one John F. Ziska of a crime, "to wit: Taking indecent liberties with a child," with intent thereby to extort from him a large sum of money, etc. The only difference in the two counts charging extortion is that in the second count, after the above quoted words, is added: "a further description thereof being to the said grand jurors unknown."

A jury was waived and the cause submitted to the court. One of the errors assigned is that the finding and judgment are against the weight of the evidence. We think this error is well assigned. There is no evidence in the record of any threat to accuse Ziska of the crime named in the indictment. The only threat proved is a threat to arrest Ziska on the complaint of the supposed father of two unnamed girls, who are said to have told their father that they saw Ziska sitting on a bench in a public park "playing with himself." Ziska testified that although he was guiltless of

any such offense, he was nevertheless induced by the defendant Dennehy, who said he was a police sergeant, to pay him several hundred dollars for "cash bonds," and to pay the supposed father (who did not appear and who was not identified) \$300 to settle the matter. Both defendants testified that they never saw Ziska until they were arrested.

If Ziska's evidence was believed by the court, as it apparently was, it would doubtless have been sufficient to convict the defendants of blackmail under a proper indictment, but it neither proves nor tends to prove the charge in the indictment in this case. Under this evidence, the only crime or misdemeanor of which the defendants threatened to accuse him was that of indecent exposure of his person in a public place, which is not the crime charged in the indictment.

It is also urged that the indictment is insufficient because it does not describe any crime. While we think there is much force in the argument, yet we consider it unnecessary to decide the point in this case, for the reason that the one already given is sufficient.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, F. J., and Barnes, J., concur.

any such attempt to use the information furnished by the informant concerning the activities of the informant in the past.

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• Important items for the business of the day

Journal of Management Studies, 1987, 20(6), 611-621

The People of State of Illinois, defendant in error, v. Daniel J. Denberry, plaintiff in error. Gen. No. 30,878.

242 I.A. 645

Prosecution for extortion. Judgment of conviction.

Error to the Municipal Court of Chicago;
Appeal from the Superior Court of Cook county;
Circuit Court of county;
County Court of county;
the Hon. , Judge, presiding. Heard
n the division of
this court at the term,

File name
53-212

Affirmed
Reversed
Reversed and remanded with directions.

Opinion filed Rehearing denied

for appellants.
for plaintiffs in error.
for appellees.
for defendants in error.
delivered the opinion of the court.

PRESIDING JUSTICE

because it was not necessary for them. With no other means
is much more to be gained, but no consideration is given
to decide the point in time when for the reason that this was
already given in sufficient.

The judgment is reversed and the case remanded.

REVEREND AND HONORABLE

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PEOPLE OF THE STATE OF
ILLINOIS, Defendant in Error.

v.

DANIEL J. DENNENY,
Plaintiff in Error.

ERROR TO
CRIMINAL COURT,
COOK COUNTY.

242 I.A. 645

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Defendant was convicted of extortion by threats "upon the indictment in this cause," and sentenced to six months in jail and to pay a fine of \$500. The indictment consists of two counts, the first of which charges defendant with unlawfully and maliciously threatening to accuse one Jacob Vriend of a crime, "towit: Crime against nature," with intent thereby to extort money from him, etc. The second count is the same except that after the words, "Crime against nature," is added, "a further description thereof being to the grand jurors unknown."

A jury was waived and the evidence consists of the testimony of Vriend, the prosecuting witness, on one side, and the defendant on the other. The defendant merely testified that prior to his arrest he never saw Vriend. Vriend testified that after he had come out of the toilet room of the Illinois Central depot at Randolph street he was arrested by a man - not the defendant - who "showed him a star;" that the supposed police officer took him back of the public library, and, with another man who came up, induced Vriend to pay them \$300 "to bail me out;" that these unknown men promised that the money would be given back to

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him as soon as the case was decided; that two months later, defendant came along with one of the unknown men, who said he got into trouble at the police station because Vriend's bonds were not high enough, and wanted \$300 more, which Vriend thereupon paid to the defendant; that two days later, the defendant again called on Vriend and induced him to pay him \$600 more, and, afterwards, \$100 "for the judge."

Assuming all this testimony to be true, and it was apparently believed by the trial judge, it has no tendency to prove the charge alleged in the indictment. There is nothing whatever in the evidence tending to prove a threat to accuse Vriend of the crime against nature.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, F. J., and Barnes, J., concur.

THE GENERAL FURNITURE COMPANY,
a corporation,
Defendant in Error.

v.

B. G. JOSEPH et al.,
Plaintiffs in Error.

242 I.A. 645

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This writ of error seeks to reverse a judgment in favor of the plaintiff in a replevin suit. The defendant B. G. Joseph, being indebted to the General Furniture Company in the sum of \$964.50 for merchandise purchased by the former from the latter, executed his chattel mortgage conveying the property in question to the furniture company as security for said indebtedness. The mortgage was duly acknowledged and recorded on June 5, 1922. By its terms, Joseph agreed to pay the debt in monthly installments during a period of thirty-five months and the final payment became due on April 29, 1925. Joseph failed to make some of the payments and when the final payment became due he owed the furniture company a balance of \$460. On March 21, 1925, Joseph gave his note for \$150 to defendant L. M. Unite, doing business as the Local Loan Company, and to secure the same gave his chattel mortgage to Unite covering the same property previously mortgaged to the furniture company. This mortgage was acknowledged before the clerk of the Municipal court of Chicago, though not in the district in which Joseph lived. The replevin suit was brought in June, 1925, and the record shows that on the replevin writ the property was taken by the bailiff from a warehouse where it was stored, on June 24, 1925, and delivered to the plaintiff. The whole question in-

volved is whether the lien of the first mortgage had expired. Some question is raised about the validity of the second mortgage, but as we regard the case, that question is immaterial.

By the terms of section 4, chap. 95, of the Revised Statutes, as amended in 1921, the plaintiff's mortgage was good and valid from the time it was filed for record, viz., June 5, 1922, until ninety days after maturity of the entire debt, that is, until ninety days after April 29, 1925. Within such ninety days the replevin suit was brought, and at the time the property was taken upon the replevin writ, the plaintiff's mortgage was, by the express terms of the statute, a valid lien upon the property. The contention of plaintiff in error to the contrary overlooks or ignores the amendment made in 1921 to the statute above mentioned.

The judgment in plaintiff's favor was correct and it is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

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PEOPLE OF THE STATE OF ILLINOIS
ex rel. MILDRED LONDELL,

Appellee.

v.

ARTHUR BOLVIN,

Appellant.

242 I.A. 645

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment against the defendant in a bastardy proceeding. The trial was before the court without a jury.

It is first contended that the court's finding is manifestly against the weight of the evidence. Counsel correctly state that there is no dispute as to the facts "except the actual act of intercourse," and in this respect the testimony of the relatrix and the defendant is irreconcilable. All the witnesses agree that the relatrix, her sister, a Mr. Epstein and the defendant, after attending a drinking party where all became more or less intoxicated, went to defendant's room in a hotel "to sober up," and there all four lay on his bed for an hour, during which the lights, as Epstein testified, were "on and off," and were "off" once for five minutes. In view of the agreement of the witnesses as to this extraordinary state of facts, it is not to be wondered at that the trial judge believed the testimony of the relatrix as to the remaining fact, instead of that of the defendant. The trial judge saw and heard the witnesses and after reading the testimony, we are unable to say that his decision as to the credibility of these witnesses was manifestly wrong.

There was no error in sustaining the objection to a leading question asked by defendant's counsel of his own witness.

Epstein. In any event, the ruling, even if erroneous, was harmless, as the answer sought by the question had already been volunteered by the witness.

The judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

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242 I.A. 645

JACOB SAMUELSON,
Appellant,

v.

SOPHIA WEINBERG.
Appellee.

APPEAL FROM

MUNICIPAL COURT,
OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is a suit for real estate commissions in which there was a trial before the court without a jury and a finding and judgment for the defendant. The plaintiff appeals.

There is no bill of exceptions or stenographic report of the evidence taken upon the trial, but the statement of facts signed by the trial judge states that defendant employed the plaintiff as a broker to sell her property and he produced a purchaser with whom the defendant entered into a written contract; that at the same time this contract was signed, a written agreement was made by the plaintiff and defendant regarding commissions which, after reciting that plaintiff had procured a purchaser for the sale of defendant's property, "as shown by a contract this day executed between her and Helen Etta Goodman," states that it is agreed that the total commission to be paid by defendant to plaintiff "shall be the sum of \$1000, and shall be due when deeds contemplated in said contract are delivered and consideration therein contracted for paid;" that three months later, the parties met by appointment at the office of defendant's attorney to consummate the sale and that a dispute arose regarding the meaning and effect of a provision of the contract of sale requiring the purchaser to give a third mortgage for \$22,500, "due and payable at the maturity of the said first and

second mortgages, in the manner following: The purchaser guarantees to pay on said third mortgage indebtedness the sum of \$5000, on, to wit, June 10, 1926, or more at his option; the balance remaining due on said ^{third} mortgage after the said payment of \$5000 when it matures, as herein mentioned, to be evidenced by a new mortgage in the form of a second mortgage on said described premises, payable in monthly installments of \$500, with interest at the rate of 6 per cent per annum;" that the purchaser tendered her thirty-six unsigned notes and her unsigned trust deed securing the same, the first of which notes was for \$5000 and the others for \$500 each; that these notes and trust deed were refused by the defendant because by the terms of the first mortgage, \$2500 was due on June 10, 1924, and \$2500 on June 10, 1925, and also because the contract required the payment of \$5000 on June 10, 1926, to be guaranteed; whereupon the purchaser left the office of defendant's attorney to ascertain whether or not she could comply with the contract by obtaining a guaranty for the payment of said \$5000 note; that the notes and trust deed were never signed and no deeds were ever delivered; that thereafter defendant filed a bill against the purchaser, Helen Goodman, to remove a cloud, and the purchaser filed a cross-bill for specific performance of the contract; that thereafter a settlement was arrived at between the defendant and the purchaser by the return to the purchaser of the \$2000 earnest money which had been paid and the dismissal of the bill and the cross-bill.

Upon the facts thus stated, the court held that the word "guarantees" in the clause above quoted is ambiguous, and as no evidence was offered as to the intention of the parties with reference thereto, the court construed it to mean that defendant had a right to demand a guarantor and to refuse to

consummate the deal for failure to provide such a guarantor, saying that there was an honest difference between the parties as to the meaning of the word above mentioned; and the court thereupon entered judgment for the defendant.

Plaintiff contends that his commission was earned when the contract of sale was signed. This would ordinarily be true, but in this case, the plaintiff agreed in writing, at the time of the execution of such contract, that his commission should be the sum of \$1000, which should be due "when deeds contemplated in said contract are delivered and consideration therein contracted for paid." We agree with the conclusion of the trial court that the contract is ambiguous, but appears to mean that it was incumbent upon the purchaser to guarantee the payment of the \$5000 note in some form, and as the purchaser did not comply with this provision of the contract, the failure of the parties to consummate the sale was not due to any fault of the defendant. Under such circumstances, plaintiff's own agreement prevents him from recovering any commission.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

ALICE FORSYTH,
Appellee.

v.

J. W. KINGSBURY and J. L. ROACH,
doing business under the firm
name of Kingsbury & Roach.

JAMES L. ROACH,
Appellant.

242 I.A. 646

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal by James L. Roach from a judgment for \$135 entered against him and J. W. Kingsbury, who were sued jointly as "doing business under the firm name of Kingsbury & Roach."

Plaintiff's claim is that defendants offered to sell her 1100 shares of class D stock in a building corporation which had not complied with the Illinois Securities Law; that she paid \$100 to them on account, which they agreed to return to her if she was unable to complete the purchase; that she demanded the return of the money paid, which they refused, and the judgment is for the sum she paid, with attorney's fees.

The evidence, which is not correctly abstracted, tends to prove that plaintiff and her husband, now deceased, saw an advertisement in a newspaper, of "Kingsbury & Roach," relating to the sale of apartments in a twenty-six-apartment building in Chicago; that they called at the building and were met by the defendant Roach, who showed them a five-room "co-operative" apartment in the building; that as they were

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going out, Kingsbury appeared and engaged them in a conversation in which, apparently, Roach did not participate; that Kingsbury told her "that was his own apartment, but he would like to dispose of it, and he would give the 1100 shares" (of stock in the building corporation) "for \$9000;" that plaintiff and her husband were willing to buy, and so stated to Kingsbury, on condition that they could sell some bonds they owned; and finally Kingsbury prevailed on the plaintiff to give him her check for \$100 as evidence of good faith and as earnest money, upon the understanding that it would be returned to her if they were unable to dispose of their bonds; that the check was made payable to the order of "Kingsbury & Roach" and was turned over by Kingsbury to Roach, who endorsed it as follows: "Kingsbury & Roach, Roach Building Acct.," and deposited it to the credit of the latter account; that being unable to dispose of the bonds, plaintiff requested the return of her deposit, first from Kingsbury and afterwards from Roach; that Kingsbury promised to return it but did not do so, and Roach merely said it was "up to Kingsbury." Roach admitted, upon the witness stand, that he had talked with the plaintiff about the sale of an apartment and admitted that he received her check and deposited the same as above stated. He denied, however, that he attempted to sell any stock, saying: "We were selling apartments," and that "in selling the building you don't sell the stock; the stock is given to him as a voting power and not as a value." The evidence further shows that the title to the building stood in the name of the Glenlunt Building Corporation, which has never filed with the secretary of state the statements and documents required by the Illinois Securities Law to be filed before such securities may be sold. Kingsbury left the State after being personally served with process. The affidavit of merits was made by Roach, for

himself and as agent for Kingsbury.

Appellant contends there is no evidence connecting him with the transaction in question. There is no merit in the contention. The defendants are sued as partners and appellant does not deny the partnership. The sale as contemplated was of 1100 shares of stock in a building corporation of which defendants were acting as agents, and appellant, Rosch, received and retained the money paid on account of such sale. They acted as a firm, and held themselves out as partners, and agents authorized to make such sales. Rosch, as well as Kingsbury, was liable under the statute for the return of the money he received, together with attorney's fees.

For the reason that defendants held themselves out as partners, there was no error in allowing the plaintiff to testify to conversations between the plaintiff and Kingsbury.

The further contention of appellant, that the provision of the Illinois Securities Law relating to attorneys' fees is unconstitutional, is waived by bringing the case to this court for review and assigning other errors of which this court has jurisdiction. (Heuren v. C. M. & St. P. Ry. Co., 236 Ill. 620; Kowalczyk v. Swift & Co., 317 Ill. 312, 323.)

The judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

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and the following results are obtained:

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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JULIUS BLUMENTHAL and MAX EICKERMAN,
Copartners, Trading as BLUMENTHAL &
COMPANY,

Appellees,

vs.

LOUIS A. GROSSKY, Trading as LOUIS
STYLE SHOP,

Appellant.

242 I.A. 646

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$1172.50 entered upon a verdict for plaintiffs in a suit brought to recover the agreed price of certain wax figures. The affidavit of merits states that as a part of the contract, plaintiffs warranted the wax figures to be free from defects and that they would not bend or crack when subjected to heat or cold, that the warranty was not fulfilled and that "defendant called upon the plaintiff to remedy the defects or accept the return" of the wax figures, but that plaintiffs failed to do either.

In anticipation of the defense outlined in the affidavit of merits, one of the plaintiffs was permitted to testify, over defendant's objections, that wax figures are not guaranteed "by the trade" against "seasonal changes" or as to durability, and that "nobody ever guaranteed wax figures." Another of plaintiffs' witnesses, a "sculptor and wax artist," testified, over objection, that he "did not guarantee any figures against cold and heat effects." The court also refused to strike out the answers of witnesses describing the condition of the wax figures when delivered as, "in perfect condition," and "nice." The court erred in both instances, and as the case was tried before a jury, it is impossible for us to say that the first error was harmless.

Therefore, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

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SIMON GUTNER and SAUL GUTNER,
copartners trading as S. Gutner
& Bros.,

Appellees,

v.

LOUIS GITTELSON, trading as
Silk Yarn Co.,

Appellant.

2421 A. 616
APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This appeal is from an order denying a motion by the defendant to vacate a verdict and judgment entered against him by default. The record shows that the plaintiffs' claim is for the value of goods sold and delivered, to which the defendant, by one M. Burger, filed an affidavit of merits to the effect that the account had been fully paid and satisfied; that a demand was made for a jury trial, and that nearly two years thereafter, the cause was called for trial, apparently in regular order, and the defendant not appearing in person or by counsel, a default and judgment were entered against him for the amount of the plaintiff's claim. More than sixty days thereafter, defendant, by another lawyer, was permitted to file a petition to set aside the judgment. The petition alleges that plaintiffs' claim had been paid in full, and also alleges that defendant employed Burger as his attorney and was not aware until more than sixty days after judgment was entered that a default and judgment had been entered against him; that he then inquired and discovered that his attorney, Burger, had ceased to practice law and was not to be found.

Counsel agree that the rule is well settled that upon a motion to set aside a default a meritorious defense and reasonable diligence must be shown. Here the petition shows a meritorious

defense, but it also shows that the default was caused solely by the negligence of defendant's attorney. To set aside a default under such circumstances would be an unauthorized exercise of power and an abuse of that discretion which a trial court may properly exercise when a defendant shows he has used reasonable diligence and has a good defense to the plaintiff's claim. In Plaff v. Pacific Express Co., 251 Ill. 243, 247, the court said: "Although a defaulted party has a meritorious defense, a default will not be set aside if he or his attorney has been guilty of negligence," citing among other cases that of Mendell v. Kimball, 85 Ill. 582, in which the following language is used with reference to a very similar case:

"We regret that we are compelled to affirm this judgment. The affidavits filed by appellant in support of this motion show satisfactorily that he had a good defense upon the merits, but he fails to show the exercise of proper diligence on his part. The only excuse presented for failure to appear in apt time, and make defense, is the fact that the attorney appellant had employed to attend to his defense was out of the city, and had been for some twenty days. No excuse is offered for the negligence of the attorney. The negligence of the attorney is, in so far as concerned the court, the negligence of the client. The public service, the successful transaction of business, requires the enforcement of wholesome general rules, although hardship may be the result in some cases."

This language of the Supreme Court leaves nothing more to be said.

The judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

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▲ 4. 1997年10月1日起，凡在境内销售货物的单位和个人，凡从事货物生产、批发、零售的单位和个体工商户的增值税纳税额在10000元以下(含10000元)的，暂免征收增值税。

General Insurance Company, appellant, v. Liberty Fire Insurance
Company, appellee. Gen. No. 30,724.
Action upon policy of fire insurance. Judgment for
defendant.

242 I.A. 646

error to the Municipal Court of Chicago;
appeal from the Superior Court of Cook county;
Circuit Court of county;
County Court of county;
Hon. , Judge, presiding. Heard
the division of
this court at the term,

affirmed
reversed
reversed and remanded with directions.
opinion filed

Rehearing denied

for appellants.
for plaintiffs in error.
for appellees.
for defendants in error.
delivered the opinion of the court.

GENERAL INSURANCE CO.,
Appellant.

V.

LIBERTY FIRE INSURANCE CO.,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

242 I.A. 646

PER CURIAM.

This appeal has been consolidated for hearing, upon one set of abstracts and briefs, with the case of General Insurance Co. v. American Merchants Fire Insurance Co., No. 30723. It is from a judgment rendered after verdict against plaintiff.

For the reasons stated in the opinion this day
filed in case No. 30723, the judgment is affirmed.

AFFIRMED.

General Insurance Company, appellant, v. Omaha Liberty Fire Insurance
Company, appellee. Gen. No. 30,725.

242 I.A. 646

Action upon policy of fire insurance. Judgment for defendant.

error to the Municipal Court of Chicago;
appeal from the Superior Court of Cook county;
Circuit Court of county;
County Court of county;
the Hon. , Judge, presiding. Heard
the division of
this court at the term,

affirmed
reversed
reversed and remanded with directions.

opinion filed Rehearing denied

for appellants.

for plaintiffs in error.

for appellees.

for defendants in error.

PRESIDING JUSTICE

delivered the opinion of the court.



461 - 30725

242 I.A. 646

GENERAL INSURANCE CO.,
Appellant,

v.

OMAHA LIBERTY FIRE INSURANCE
CO.,
Appellee.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

PER CURIAM.

This appeal has been consolidated for hearing, upon one set of abstracts and briefs, with the case of General Insurance Co. v. American Merchants Fire Insurance Co., No. 30723. It is from a judgment rendered after verdict against plaintiff.

For the reasons stated in the opinion this day filed in case No. 30723, the judgment is affirmed.

AFFIRMED.

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THE FOREMAN TRUST AND SAVINGS
BANK, guardian of MARY SOCKEL,
a minor,

Appellee,

v.

YELLOW CAB COMPANY, a
corporation,

Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

242 I.A. 646

PER CURIAM.

Defendant appeals from a judgment for \$10,000 in a personal injury suit brought by the guardian of a girl 9 years old at the time of the accident complained of. It took place in August, 1923, on the south side of 51st street (which runs east and west), Chicago. Seeley avenue runs north from that street but does not cross it. The little girl lived on the east side of Seeley avenue a few doors north of 51st street. She left her home to go to a store on the south side of 51st street a few lots west of Seeley avenue. While crossing 51st street she was struck by a yellow cab going east on that street. There was some discrepancy in the testimony as to what course she took in crossing 51st street, whether she crossed Seeley on the north side of 51st and then went south from the northwest corner of the junction of the two streets, or whether she came diagonally across from the northeast corner. The little girl testified that when she started to cross 51st street she saw a cab coming from the west about "three blocks and a half away - pretty nearly a half mile," and that the next time she saw it it was about 6 inches away from her and about 6 inches from the curb. The evidence of other witnesses tended to show that while they did not see the girl at the precise moment she was knocked

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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down by the cab, as she testified, they saw the cab coming at a speed of 25 to 30 miles an hour, and heard the grinding and squeak of the brakes and saw the car skidding and its front wheels turn toward and against the curb as it stopped, and that the driver got out and picked up the little girl in front of the car.

On such evidence defendant argues that there was not sufficient proof of negligence nor of the exercise of due care of the child for one of her age, intelligence, experience and capacity. The child had nearly crossed the street and it was for the jury to say whether one of her age, intelligence, experience and capacity might not think, as she testified, that she could safely cross it under the circumstances. She must have been in plain sight of the driver of the cab as there was no other traffic on the street and it was broad daylight. The manner of his stopping the car indicates that he was driving at the speed testified to, and he should have been able to see the danger to the little girl if he kept it up, until too late to avoid the accident. We find no occasion to disturb the jury's verdict on the questions of negligence and the exercise of due care by the injured girl.

The defendant filed a special plea denying ownership and operation of the cab in question. It claimed it had no report or knowledge of the accident. Plaintiff made out a prima facie case on that issue. It proved by several witnesses that as is the case of the equipment used by defendant, the cab was yellow; that "it had their wheels" and the words "Yellow Cab Company" on its door, and that such words were on the hat band of the driver. To meet this prima facie case defendant called to the witness stand the secretary of the Police Vehicle Bureau who has charge of licensing taxi cabs and investigating complaints with regard to

them, and also a person connected with the claim department of defendant. Both testified to the effect that other cabs at that time came into the city from surrounding towns that were painted the same color and bore the same lettering in size and appearance as the defendant company's cabs, and that the drivers had a cap with the same band and uniform. Defendant urges that such evidence overcomes the effect of the prima facie case made out by plaintiff as to the identity of the cab. On this question we are not in perfect accord. The majority of the court think it was a question that might properly be left to the jury, and that it cannot be said that defendant's evidence preponderates against the prima facie case of plaintiff.

It is also urged that the verdict was excessive. Here, again, we think it was a question for the jury to decide, especially as the damages consisted of injuries, pain, suffering and inconvenience that do not admit of exact mathematical computation. The little girl received treatment from her mother at home for her bruises, and continued to walk back and forth to school for several months, but was unable to run around and play as usual. From the middle of the next January until the middle of April following she lay in bed in much pain and suffering. Her hip had become swollen and painful. A doctor was called in January and treated her for rheumatism. In April she was carried to another doctor. He found several openings on the upper part of her thigh that discharged pus and treated her from that time until the time of the trial in March, 1925. After some treatments the openings and discharge of pus would heal and then there would be a recurrence of these conditions. Pieces of bone came away on several occasions. The openings would heal up and then discharge pus again. The last healing was about two months before the trial. That doctor diagnosed the case as an impacted fracture with suppuration and inflammation of the bone and marrow. In addition to his treat-

There are two main points to be considered in this connection. First, the fact that the system is not a simple one, but a complex one, involving many different factors, and secondly, the fact that the system is not a static one, but a dynamic one, involving many different factors. The first point is that the system is not a simple one, but a complex one, involving many different factors. The second point is that the system is not a static one, but a dynamic one, involving many different factors.

Second point, the system is dynamic.

It is also worth noting that the system is not a static one, but a dynamic one, involving many different factors. The first point is that the system is not a static one, but a dynamic one, involving many different factors. The second point is that the system is not a static one, but a dynamic one, involving many different factors. The third point is that the system is not a static one, but a dynamic one, involving many different factors. The fourth point is that the system is not a static one, but a dynamic one, involving many different factors. The fifth point is that the system is not a static one, but a dynamic one, involving many different factors. The sixth point is that the system is not a static one, but a dynamic one, involving many different factors. The seventh point is that the system is not a static one, but a dynamic one, involving many different factors. The eighth point is that the system is not a static one, but a dynamic one, involving many different factors. The ninth point is that the system is not a static one, but a dynamic one, involving many different factors. The tenth point is that the system is not a static one, but a dynamic one, involving many different factors.

ment he prescribed a shoe with a thick sole and high heel for the right foot so as to raise her body and allow her injured leg to hang suspended, and also the use of crutches, which were still in use at the time of the trial. At that time the hip had healed up and the doctor thought it would remain so. Both he and another physician testified to the effect that such an injury might result from such a collision. Defendant introduced expert evidence to the contrary but we do not think that the preponderant weight of plaintiff's evidence was disturbed thereby. Nor can we say under the circumstances that the verdict was manifestly excessive.

It is also urged that an instruction given at plaintiff's request was erroneous. The instruction reads as follows:

"You are instructed that if you believe from the evidence that the plaintiff, while in the exercise of such care for her own safety, as is ordinarily used by a child of the age, intelligence, experience and capacity of the plaintiff, if you believe that she was in the exercise of such care - was injured as a direct result and in consequence of the negligence of the defendant, as charged in the declaration, if you believe that the defendant was so negligent, then you should find the defendant guilty." (Given.)

The contention is that in that form the instruction omits essential elements of the cause by ignoring the issue raised by the special plea of non-ownership, etc., and by not requiring the jury to find that plaintiff's ward was in the exercise of due care just before as well as at the time of the alleged accident. We do not agree with the contention, or think there was reversible error in giving the instruction. Instructions covering these points, given for defendant, clearly stated the law, so that it cannot be said that the jury was misled by the instruction in question.

The judgment is affirmed.

AFFIRMED.

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

242 I.A. 647

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 29 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

THE CHIEF CLERK
OF THE COURT
CHICAGO, ILL.

The People of the State of Illinois,

Defendant in Error,

vs.

Elmer Mizer, William Mizer, and Rene
Van de Voorde,

Plaintiffs in Error.

Writ of Error to the
County Court of
Rock Island County.

242 I.A. 647

Partlow, P. J.

Plaintiffs in error, Elmer Mizer, William Mizer, and Rene Van de Voorde, were found guilty by a jury in the county court of Rock Island County upon two counts of an information charging them with a violation of the Prohibition Act, and a writ of error has been prosecuted from this court to review the judgment.

William Mizer was the proprietor of a soft drink parlor in the city of East Moline, Illinois. Van de Voorde was his bartender, and Elmer Mizer was his nephew. Elmer Mizer operated a hotel in the building in question and rented the soft drink parlor to his ~~nucle~~ William Mizer. In the early part of 1924, the sheriff and state's attorney employed Purl Fronk to investigate violations of the prohibition law in the county. Fronk testified that on February 2, 1924, he bought liquor on the premises but he did not know from whom he purchased it. On March 11, 1924, the sheriff swore out a search warrant, and shortly afterwards he went to the premises with several of his deputies. When they entered the building Van de Voorde was behind the bar, and the sheriff testified that Van de Voorde attempted to pour a liquid from a glass into a sink. The sheriff leaped across the bar and secured the glass with a small portion of the liquid. He smelled the liquid, tasted it, and testified that it had the smell of "hooch". The glass containing this liquid was admitted in evidence. Prior to the trial plaintiffs in error moved to quash the search warrant, and sequestered the glass which was subsequently admitted in evidence. The court denied the motion and this ruling is assigned as error.

3. *Conclusions*

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The affidavit upon which the search warrant was based, alleged that the sheriff "has just and reasonable grounds to believe, and does believe, that intoxicating liquor is now unlawfully possessed and kept for sale within prohibition territory, (describing the premises) and that the following are the reasons for this belief, to-wit: That intoxicating liquor is possessed and kept for sale and sold at the above place. Further, that he has in his possession liquor purchased at the above place. Further that when he entered the above place on February 26, 1924, Elmer Mizer, from behind the bar, dumped something from a pitcher into the sink and the odor of hooch could be detected." It is insisted that the grounds for the belief of the sheriff are not in accordance with the announced rule of law governing affidavits of this character.

In *People vs. Elias*, 316 Ill. 376, it was held that the affidavit must charge the commission of a crime; that it cannot be on information and belief; that the facts must be within the knowledge of the affiant. The affidavit in this case comes within the rule announced. There is a positive averment that intoxicating liquor is possessed and kept for sale on the premises; that affiant has in his possession liquor purchased at the above place; that when he entered the above place, on February 26, 1924, Elmer Mizer, from behind the bar, dumped something from a pitcher into the sink and the odor of hooch could be detected. These allegations are not upon information and belief, are of such a character that perjury could be assigned upon them, and they charge the commission of a crime under the Prohibition Act.

Even if the affidavit was not sufficient, the court properly refused to sequester the evidence and the same was properly admitted. The soft drink parlor was a public resort where the public was invited to enter and trade. The sheriff had a right to enter the premises even though he had no search warrant. He testified that after he entered he saw the bartender emptying the glass into the sink, he leaped over the bar, secured a part of the contents, and that it smelled and tasted like "hooch". Section 2, Division 6, Chapter 38, of the Statute makes it the duty of every sheriff when any criminal offense is com-

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mitted, or attempted, in his presence, forthwith to apprehend the offender and to take him before some justice of the peace to be dealt with according to law. Under this section of the statute it was not only the right of the sheriff, but it was his duty, if a violation of the law was committed in his presence, to apprehend the offender and take possession of the incriminating evidence. Under these circumstances, there was no error in admitting in evidence the exhibit complained of.

The tenth instruction on behalf of defendant in error told the jury that the possession of liquor by any person not legally permitted under the law to possess liquor, shall be prima facie evidence that such liquor is kept for the purpose of being sold, or otherwise disposed of in violation of the law; and the burden of proof is upon the possessor to prove that such liquor was lawfully acquired, possessed and used. It is insisted that this instruction was erroneous.

The instruction is substantially in the language of section 40 of the Prohibition Act, and it is claimed by defendant in error that a similar instruction was approved in *People vs. Back*, 305 Ill. 593. In that case an instruction quite similar to this one was under consideration in connection with Section 40 of the Prohibition Act, and it was there held that the provisions of Section 40 were constitutional, and were within the power of the legislature to pass, but it was not held that the giving of an instruction of this kind was proper under all circumstances. In the later case of *People vs. Tate*, 316 Ill. 52, this question was again before the court. The instruction in that case was, that the possession of intoxicating liquor by any one is prima facie evidence that such person keeps and possesses said liquor for the purpose of bartering and selling the same. The language of these instructions is not identical. The instruction now before us is that that the possession of liquors by any person not legally permitted under the law to possess liquor shall be prima facie evidence, etc., while the instruction in the Tate case related to any person possessing intoxicating liquor, whether lawfully or otherwise. For this reason it might be argued that the Tate case is not authority for holding

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that the instruction herein given is improper, but on page 59 of that opinion the court held that when a defendant goes to trial and introduces evidence disputing the facts charged against him, it is then a question whether the evidence establishes a case against him beyond a reasonable doubt, and where there is such a contest in the evidence, there should be no instructions given as to what constitutes a prima facie case. There was a contest in the case now before us as to the possession of intoxicating liquor in violation of the law. Plaintiffs in error went to trial upon that question, therefore there should have been no instruction given under Section 40 of the Prohibition Act, and for that reason the tenth instruction should have been refused.

Complaint is made of the refusal of the court to give instructions 18 and 27 offered on behalf of the plaintiffs in error. Instruction eighteen is as follows; "The jury are instructed that even though they believe from the evidence beyond a reasonable doubt that the witness, Fronk, purchased intoxicating liquor at the premises described as 1002 15th Avenue, East Moline, Illinois, still you cannot find the defendant, William Mizer, guilty upon that evidence alone under the information herein, unless you are convinced from the evidence and beyond a reasonable doubt that the said party who sold said liquor to said Fronk was an agent, servant, or employe of said William Mizer, and that at the time of said sale to said Fronk that said William Mizer was conducting an illegal ~~drums~~ dram shop, or had knowledge that the said party who made said sale was possessing intoxicating liquors for sale at said premises, or was selling intoxicating liquor at said premises." The other instructions refused were along the same line, and all embodied the question of the liability of an employer for the illegal acts of his agent or servant in violation of the Prohibition Act. It is insisted by plaintiffs in error that the eighteenth instruction announces a correct rule of law and should have been given.

Before considering this instruction we desire to say that even though the eighteenth instruction was correct, we do not thin,^k

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plaintiffs in error were justified in offering nine instructions along this line thus imposing upon the trial court the burden of considering all of them. One instruction given would have been sufficient to announce the general rule of law applicable to the point in issue.

Section 23 of the Search and Seizure Act, provides that in all prosecutions under the act, it shall not be necessary to show the knowledge of the principal in order to convict for the acts of an agent, clerk or servant. Section 3 of the same statute provides that whoever, within prohibition territory, by himself or another, either as principal, clerk, or servant, in any manner manufacture, keep for sale, sell, give away, or dispose of, or aid any person in procuring any intoxicating liquor in any quantity ~~whatever~~ whatever, shall be punished. In *People vs. Falk*, 310 Ill. 282, these two sections were considered, and it was held that they must be construed together; that before Section 23 can be applied to the extent of holding a principal guilty for the acts of his agent without proving knowledge by the principal of the agent's acts, all essential elements of the offense defined by Section 3, including the existence of the agency, and the act of the agent, must be proved beyond a reasonable doubt; that it is error to give an instruction directing a verdict finding the defendant guilty of selling intoxicating liquor if the jury believe the sales were made by any person who was acting as his agent, thus ignoring the issues based upon conflicting evidence as to whether the defendant was engaged in the illegal business of selling liquor, and regardless of whether the agency was in fact established. This authority is applicable to the question now before us and in order to prove William Mizer guilty, it was necessary that the state should prove that the person who sold the liquor to Fronk was an agent, servant, or employe of William Mizer, and that, at the time of said sale, Mizer was conducting an illegal dram shop, or that he had knowledge that his servant who made the sale had intoxicating liquor for sale at said premises, or was selling intoxicating liquor at said premises. The ei

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announced a correct rule of law, and should have been given.

Complaint is made of the instruction as to the form of the verdict offered by defendant in error. It consisted of two parts. The first part told the jury that if they found all of the defendants or any of them, guilty under either or both counts, their verdict should be: "We, the jury, find the defendant, or defendants, (naming him or them) guilty in manner and form as charged in the _____ count or counts of the information herein." The second part told the jury that if they found the defendants, or either of them, not guilty, the form of the verdict might be: "We, the jury, find the defendant or defendants(naming him or them) not guilty," It further instructed the jury to use one of these forms as a model.

In order to properly instruct the jury as to the form of their verdict the court should have given them a form of a verdict finding all of plaintiffs in error guilty, or all of them not guilty, or part guilty and part not guilty. There is undoubtedly considerable uncertainty in this form of a verdict, and there might have been prejudicial error to plaintiffs in error. The jury is told to use only one form as a model, but neither form tells the jury how to find some of plaintiffs in error guilty and others not guilty. The plaintiffs in error offered a form of a verdict, but it is not marked given nor refused as far as the abstract shows, and we do not know whether it was before the jury for their consideration. If this instruction was the only error in the case we would hesitate to reverse the judgment on account of it, but as the case will have to be tried again a proper form of verdict should be submitted which could not mislead or confuse the jury.

The jury retired to consider their verdict about four o'clock P. M. May 22, 1924. About ten o'clock that night the presiding judge informed the bailiff that it would be necessary for him to go to Chicago the next day and he directed the bailiff to inform the jury that when they reached a verdict it could be sealed and left in the custody of the foreman, and they would be discharged to report on May 24 at nine o'clock. The judge directed the bailiff to hold the jury together if

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they did not agree upon a verdict until the judge returned on May 24. The jury reached a verdict on May 23. Counsel for plaintiffs in error insist that the judge improperly left the county, and that while he was gone there was in fact no court in session, and that this constituted reversible error.

Section 15, Division 13, Chapter 38 of the Statute provides that in cases of misdemeanor, if the prosecutor for the people and the person on trial, shall agree, which agreement shall be entered upon the minutes of the court, that the jury, when they have agreed upon their verdict, may write and seal the same and after delivering the same to the clerk, may separate, it shall be lawful for the court to carry into effect any such agreement and receive any such verdict delivered to the clerk as the lawful verdict of such jury. In this case there was a stipulation in open court for a sealed verdict. We do not know whether this agreement was entered of record. The verdict was retained by the foreman until the court convened on May 24. In *People vs. Beck*, 305 Ill. 592, the court considered the question of communications to juries after they have retired to consider their verdict, and held that the trial judge should not communicate with the jury except in open court, in the presence of all parties, and any instructions given should be in writing. That rule was not complied with in this case, and the communication, therefore, should not have been delivered by the bailiff. The question as to the departure of the court from the jurisdiction has not been before the Supreme Court of this state in any case to which our attention has been called. In *Martin vs. State*, 73 S. E. 686, the Supreme Court of Georgia held that "a temporary absence of the judge, such as has been referred to in the cases cited above, involved his presence at a point where he was easily accessible to the parties, counsel, officers of the court, and the jury. Where the judge is within call of the jury and physically absented, but at a place so nearby that he can easily return, if needed, he may be presumed to be constructively present at the courthouse; but this presumption cannot be indulged where the judge goes to

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a place beyond the jurisdiction of the court in which the trial is being held." We do not know that any injury was occasioned to plaintiffs in error by reason of the temporary absence of the judge out of the county but we do not feel justified in approving this practice. After the jury retires the judge should be, at all times, reasonably accessible to the jury and the officers of the court so that they may remain under his supervision and direction until a verdict has been reached, and during such time there should be no communications with the jury except as provided by law.

It is next insisted that the second count of the information is invalid and does not charge the commission of a crime. We do not understand that counsel made a motion to quash this count, or specifically called this point to the attention of the court, nor is our attention called to any place in the abstract where there was a motion in arrest of judgment. We think, however, that the second count was sufficient to charge the sale of intoxicating liquor.

For the errors indicated the judgment will be reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT }ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 29th day of
May in the year of our Lord one thousand
nine hundred and twenty-six

Justus L. Johnson
Clerk of the Appellate Court

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

242 I.A. 647

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 29 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

James E. Bennett, Frank A. Miller,
Frank J. Seibert, and Frank F.
Thompson, Co-partners, doing business
as James E. Bennett & Company,

Appellants,

Appeal from the Circuit
Court of La Salle County.

vs.

Samuel Jacobsen,

Appellee

242 I.A. 647

Partlow, J:

Appellants, James E. Bennett & Company, began an attachment suit in the circuit court of La Salle County against appellee, Samuel Jacobsen, to recover \$1814.52 alleged to be due for commissions and interest on stocks bought and sold by appellants for appellee. The Union National Bank of Streator, Illinois, was served as garnishee and certain real estate belonging to appellee was attached. Upon issue being joined there was a trial by jury, judgment for appellee, and an appeal was prosecuted to this court where the judgment was reversed on account of erroneous instructions. (232 Ill. App. 633.) Upon the cause being reinstated in the trial court, appellants filed an amended declaration consisting of the common counts and alleged damages in the sum of \$2500.00. Appellee filed the general issue together with his affidavit that he was not indebted to the appellants, but that all lawful accounts charged to him by appellants had been paid in full; that all their claims were on account of gambling transactions to be settled upon margins; that appellee paid to appellants during the transactions, \$10,000.00 more than he received from them, which amount was lost by him and won by them, and that he never received anything of value for said losses. There was a trial by jury, a judgment for appellee, and this appeal was prosecuted. After the judgment was rendered appellee entered into his recognizance pursuant to Section 15 of the Attachment Act, the attachment was dissolved, the garnishee

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released, thus changing the suit from a proceeding in rem to one in personam.

When this cause was before us on the former appeal we fully stated the facts and it will not be necessary to repeat them. At that time we held that there was a sharp conflict in the evidence and it was of the utmost importance that the jury, in order to properly determine these questions of fact, should be accurately instructed. That same condition exists upon this appeal.

The twenty seventh instruction on behalf of appellee told the jury if they believed from the evidence that the claims of the plaintiffs are based upon transactions between said parties whereby said plaintiffs bought and sold stock or other commodities for the defendant with the mutual understanding between said parties that said stock or other commodities were not to be delivered, but that when the market price of such commodities increased, plaintiffs were to pay Jacobsen the difference, and that when the market price decreased, he was to pay plaintiffs the difference, then such transactions are gambling transactions, and the verdict should be for the defendant. It is insisted that this instruction does not correctly define a gambling transaction; that it fails to indicate that the mutual intent to gamble must exist at the time of the making of the contract and not at any other time; that there cannot be gambling in stocks where they are actually bought and sold; that the actual purchase and sale of stocks by a broker, even though subsequently there is no delivery of the stock to the customer but a settlement is made on differences, does not constitute a gambling transaction. Section 328 of the Criminal Code (Smith Statutes 1925, page 911,) provides that whoever contracts to have or give himself or another the option to sell or buy, at a future time, any stock, or other commodity, where it is, at the time of making such contract; intended by both parties thereto that the option whenever exercised, or the contract resulting therefrom, shall be settled, not by the receipt or delivery of such property, but by the payment only of difference in price thereof, that all such

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transactions are gambling transactions and void. This instruction does not contain all of the elements contained in the statute necessary to constitute a gambling transaction. It was not accurate because it told the jury that if the parties bought and sold stock, with the mutual understanding that the transactions were to be settled on differences, the contracts were gambling transactions. This cannot be true for the reason that if goods are actually bought and sold the transactions are legitimate. Market deals become gambling transactions only where there are pretended purchases and sales. The sixteenth instruction refused on behalf of appellants contained part of the elements necessary to constitute a gambling transaction as provided by the statute and it was approved in *Dillon vs. McCrea*, 59 Ill. App. 505, but as it is very much in the nature of an argument its refusal did not constitute reversible error.

The twenty eighth instruction on behalf of appellee told the jury that by the preponderance of the evidence is not meant the greater number of witnesses, but that the preponderance of the evidence may be established by the lesser number of witnesses and by facts and circumstances; provided the jury believe from all the evidence in the case that the truth lies upon the side of the lesser number of witnesses. This instruction is not accurate. The preponderance of the evidence is not determined alone from the number of witnesses testifying. It is determined from all the facts and circumstances in evidence. The number of witnesses is often one of the material facts to be taken into consideration in determining the preponderance. In *The Matter of Jo H. Willits Dunning*, 211 Ill. App. 633; *Rynearson vs. McCartney*, 203 Ill. App. 555; *DeJoannis vs. Domestic Engineering Co.*, 185 Ill. App. 271; *Yanloniz vs. Spring Valley Coal Co.*, 185 Ill. App. 563. The jury from the language used might have reason to believe that the number of witnesses was not material and was not to be considered in determining the preponderance. The preponderance may be established by the lesser number of witnesses, together with all the facts and circumstances in evidence, but the second clause does not so state, but it tells the

jury that the preponderance may be established by the lesser number of witnesses and by facts and circumstances, omitting that the facts and circumstances must be in evidence in the case. This omission was erroneous. *Balenovic vs. Ansick*, 181 Ill. App. 660. Appellee's defense rested solely upon his own testimony, the greater number of witnesses testified for appellants, and the giving of this instruction might have prejudicially misled the jury on this point. Nor do we think the last clause cured this error.

The twenty ninth instruction on behalf of appellee told the jury that in determining the weight to be given to the testimony of any witness, the jury should consider the conduct of such witness while testifying, together with other facts therein enumerated. The objection is that the word "may" or "might" should have been used instead of the word "should", and that the jury should have been told that in weighing the testimony of the witnesses the jury may or might consider the conduct, etc., of the witnesses. In *Lyons vs. Chicago City Railway Co.*, 258 Ill. 75, on page 84, the use of these words was considered. It was held that may or might should have been used, but that the instruction as given did not constitute reversible error.

The nineteenth refused instruction on behalf of appellants told the jury that while the law permits the defendant to testify in his own behalf, nevertheless the jury has the right in weighing the evidence to determine how much credibility is to be given to it, and to take into consideration that he is the defendant and interested in the result of this suit. In *West Chicago City Railway Co. vs. Dougherty*, 170 Ill. 379, an instruction in almost this identical language was held to be good and its refusal was held to be error. That ruling was followed in *Chicago & Eastern Illinois Railroad Company vs. Burridge*, 211 Ill. 9, where it was held that an instruction stating that the jury in weighing the plaintiff's evidence may take into consideration that he is interested in the result of the suit, is not improper as singling out the plaintiff

where the suit is against a corporation and the plaintiff is the only witness directly interested in the suit. This has also been announced as the rule where the suit is between individuals and one of them does not testify as was true in this case. *Smith vs. Peter & Volz*, 205 Ill. App. 379; *Maxwell vs. Chicago & Eastern Illinois Railroad Company*, 140 Ill. App. 156; *Schlesinger vs. Rogers*, 80 Ill. App. 420. The instruction should have been given.

The twenty third refused instruction offered by appellants told the jury that the transactions, if any, made by the plaintiffs for the defendant will be presumed to be in conformity to the rules of the stock exchange in the absence of any other agreement or understanding of the parties. It is insisted by appellants that this instruction was held good in *McAyeal vs. Gullett*, 202 Ill. 214, and that its refusal in this case was error. We have examined that case and find that in that case the rules of the stock exchange were admitted, in evidence. In the case at bar the rules of the stock exchange were not admitted in evidence, and therefore we do not think there was any error in refusing this instruction.

Complaint is made of several instances in which the witness Grennan testified to the manner in which business was transacted in the Chicago office of the appellants and he was permitted to comment thereon. Gross errors have been assigned by appellee upon the ruling of the court in permitting the same witness to testify how business was transacted in the Chicago and New York offices. The witness was the agent of appellants in the city of Streator, and should have been permitted to testify to such facts as were within his own knowledge and within the scope of his agency. The manner in which business was transacted in Chicago and New York, which was outside of his personal knowledge, was improperly admitted, and any criticism of the manner in which business was transacted by appellant was improper and should not have been admitted.

In the opening statement Mr. Painter, one of the attorneys for

appellee, said: "Gentlemen, you heard one side of this case, but there is another side to it. That man sitting there, the defendant here, lost over \$10,000.00 - ". Counsel for appellants objected and the objection was sustained. During the direct examination of appellee, appellants objected and moved that a certain conversation between appellee and Grennan be stricken on the ground that it was incompetent and not binding upon appellants, and was prejudicial. Counsel for appellee replied: "There don't seem to be anything binding upon them." An objection was made to this and sustained. Counsel for appellants moved to strike out the remark. Whereupon counsel for appellee replied: "You can't lecture me here and chatter away like that." An objection was made to this remark and it was moved that it be stricken and counsel for appellee replied: "I ask that this be stricken. He is not the whole thing in this case." During the course of the cross-examination of appellee, appellants' counsel put this question to him. "Q. You have had a lot of experience on the stock market?" and one of the counsel for appellee replied: "About \$10,000.00 worth." A little later this question was asked: "Q. What did you mean in that letter, referring to the letter of December 13th, 1919, when you said you think they have all favors?" This was objected to by counsel for appellee and counsel for appellants said: "I think I have the right to go into this." The objection was overruled and counsel for appellee remarked: "Taking his money - that is the only favor." On the argument of the case counsel for appellee said: "These brokerage institutions all over the country are supposed to be run according to law and they are run that way for a time but we do not know when they are and when they are not, because they always take the money, and the asylums and homes for orphans are filled all over the country with -" Objection was made to this remark and the objection was sustained.

It is insisted by appellee that these remarks were highly

prejudicial and constituted reversible error. As we have already said this case was close upon the facts and it was essential that the jury should be properly instructed. It was also just as important that improper remarks should not be made during the progress of the trial. In Illinois Central Ry. Co. vs. Seitz, 111 Ill. App. 242, it was said: "There is enough natural and inherent prejudice in the minds of jurors against railroads and other corporations without having it augmented by direct and improper appeals calculated to arouse the sympathy, passion, or prejudice of jurors. A lawyer who tries his case in the proper manner, observing the ethics of the profession, is at a great temporary disadvantage when trying a cause against counsel who resorts by improper language to obtain a verdict. Verdicts thus obtained generally are and always should be short lived. Trial courts should set them aside as often as they are obtained. It is the policy of this court to discourage such misconduct on the part of lawyers by reversing judgments obtained by them when it is manifest that they are the result of unprofessional conduct."

The above quotation was quoted with approval by this court in Eilers vs. Peoria Ry. Co., 200 Ill. App. 489, and is applicable in a measure to the facts in this case. Appellants had a right to a fair trial according to the rules of evidence. No one can doubt the absolute impossibility of appellants receiving a fair trial in view of the remarks of counsel. As a general rule the trial court sustained the objections without reprimanding the violators. To merely sustain the objection under the circumstances was of no avail or benefit to appellants. There was no possible chance for appellants to obtain fair consideration from the jury under the facts here presented. Their minds were inflamed against appellants by unwarranted remarks of counsel. It was the duty of the trial judge to set aside this verdict, not only because appellants were deprived of a fair and impartial trial, but for the reason that it

was necessary to the preservation of proper decorum and dignity in the court, as well as to maintain the majesty of the law.

For the errors indicated the judgment will be reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 29th day of
May in the year of our Lord one thousand
nine hundred and twenty-six

Justus L. Johnson
Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

242 I.A. 647

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
JUN 3 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

7585

April Term, A.D. 1926,

Agenda 5.

Jacob Castner,

242 I.A. 647

appellant,

Appeal from the Circuit Court

vs.

of Henry County.

John Bomleny,

appellee,

Jett, J.

This is a suit in trespass brought by Jacob Castner, appellant, against John Bomleny, appellee, in which he charges that he was unlawfully assaulted, beat and bruised. A trial was had in the Circuit Court and the jury found for appellee. Judgment was rendered on the verdict of the jury and the plaintiff, appellant here, prosecutes this appeal.

For the purposes of this opinion appellant will be called plaintiff and appellee defendant.

The declaration consists of six counts. Two separate and distinct assaults are charged as having been made upon the plaintiff by the defendant. The defendant pleaded the general issue and two special pleas. The defense interposed was that of self-defense and the issue was so formed by the pleas. The first assault complained of is that on a certain date, in the declaration mentioned the plaintiff and defendant were each crossing a certain park and as they met neither of them appeared to get out of the well beaten path and the result was that they came together. No harm or injury was done to the plaintiff on this occasion. The second assault relied upon for a recovery is that on a street in the Village of Annawan, on or about the 19th of November, 1923, at about twelve o'clock noon, the plaintiff, who was in the employment of a Dr. Young, was preparing to put some water in the automobile of the doctor, and while he was on the sidewalk with a view of obtaining the water the defendant assaulted, beat, bit and bruised him and hit him with a bottle of milk on the right side of the head

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This is a list of the names of the persons who were present at the meeting of the Board of Directors of the Bank of the City of New York, held on the 1st day of January, 1842. The names are given in the order in which they were called to the chair.

For the purpose of this list, the names of the persons who were present at the meeting of the Board of Directors of the Bank of the City of New York, held on the 1st day of January, 1842, are given in the order in which they were called to the chair.

The following is a list of the names of the persons who were present at the meeting of the Board of Directors of the Bank of the City of New York, held on the 1st day of January, 1842.

First Assembly: The names of the persons who were present at the meeting of the Board of Directors of the Bank of the City of New York, held on the 1st day of January, 1842, are given in the order in which they were called to the chair.

Second Assembly: The names of the persons who were present at the meeting of the Board of Directors of the Bank of the City of New York, held on the 1st day of January, 1842, are given in the order in which they were called to the chair.

Third Assembly: The names of the persons who were present at the meeting of the Board of Directors of the Bank of the City of New York, held on the 1st day of January, 1842, are given in the order in which they were called to the chair.

Fourth Assembly: The names of the persons who were present at the meeting of the Board of Directors of the Bank of the City of New York, held on the 1st day of January, 1842, are given in the order in which they were called to the chair.

Fifth Assembly: The names of the persons who were present at the meeting of the Board of Directors of the Bank of the City of New York, held on the 1st day of January, 1842, are given in the order in which they were called to the chair.

Sixth Assembly: The names of the persons who were present at the meeting of the Board of Directors of the Bank of the City of New York, held on the 1st day of January, 1842, are given in the order in which they were called to the chair.

Seventh Assembly: The names of the persons who were present at the meeting of the Board of Directors of the Bank of the City of New York, held on the 1st day of January, 1842, are given in the order in which they were called to the chair.

and that he was seriously injured thereby; that in consequence of his injury he was confined in the hospital for a number of days.

Many reasons are assigned for a reversal of the judgment. It is the contention of the plaintiff that the court erred in the admissibility of certain testimony. On the trial the defendant was permitted to prove threats made by the plaintiff against him. This testimony was admitted on the theory, we take it, that if the plaintiff had made threats against the defendant it would be a reasonable inference that he sought him for the purpose of executing those threats; that they served to characterize the plaintiff's conduct towards the defendant at the time of their meeting and at the time of the alleged assault. We think the testimony of the threats made by the plaintiff were admissible.

It appears the defendant was indicted in the Circuit Court of Henry county, and that the cause was transferred to the county court for process and trial, and in that court the defendant entered a plea of guilty to an assault with a deadly weapon upon the plaintiff and was fined \$50. The record of the county court was admitted showing the plea of guilty and the imposing of the fine. The defendant was permitted to explain his plea of guilty. It is insisted by the plaintiff that it was error for the court to allow the defendant to explain his plea of guilty.

Schreiner vs. The High Court, etc., 35 Ill. App. 576, was an action upon a contract of insurance and among other things the insurance company pleaded that the plaintiff, who was the beneficiary, did feloniously kill Mathew Schreiner, the insured, and that she pleaded guilty to manslaughter. In discussing the question of the effect of the plea at page 579 and 580 the court said: "Her plea admitting guilt of manslaughter is like any other admission of the kind, not conclusive, but subject to contradiction or explanation when proved against her in any civil proceedings." We are of the opinion that the court did not error in allowing the defendant to explain his plea.

The plaintiff complains that he was not permitted to cross-examine the defendant upon the explanation offered and that the objection of the defendant was sustained on the ground that the plea spoke for itself. The objection made by the defendant that the plea spoke for itself was overruled by the court. The record discloses also that the plaintiff was allowed to cross-examine the defendant as to why the plea of guilty was entered.

Much complaint is made by the plaintiff of the instructions. The record discloses that the jury were very fully instructed on the part of the plaintiff and while there may be some slight error in the giving and modifying of the instructions, we are not prepared to say that reversible error was committed in that respect. It is conceded by the plaintiff that the testimony is conflicting. After an examination of the evidence it appears to us that the weight of the testimony is in favor of the contention of the defendant. The jury having seen and heard the witnesses and having been fully instructed as to the law of the case, we do not feel that we would be authorized to set aside their finding, and therefore the judgment of the Circuit Court of Henry County is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 3rd day of
June in the year of our Lord one thousand
nine hundred and twenty-six

Justus L. Johnson
Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

242 I.A. 647

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
JUN 3 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

The People of the State
of Illinois,

Defendant in error,

vs.

Hyman Levin,

Plaintiff in error,

Error to the County Court
of Lee County.

242 I.A. 647

Jett, J.

The State's Attorney of Lee county, filed an information consisting of three counts against the plaintiff in error, charging him with a violation of the Prohibition Act. Subsequently the information was amended. A trial was had which resulted in the jury finding the defendant guilty on all of the counts in the information. Motions for a new trial and in arrest of judgment were made and overruled. The court sentenced the defendant to pay a fine of \$1,000 under the first count of the amended information and to imprisonment in the county jail for a period of 180 days under the third, and omitted to sentence him on the second count. Exceptions were entered by the plaintiff in error. He prosecuted a writ of error to the June Term, 1925, of the Supreme Court. The cause was transferred by the Supreme Court to this court.

It is argued that the court committed error in refusing to quash the amended information. We are of the opinion that the amended information charged a violation of the Prohibition Act and that the court did not err in denying the motion to quash. The premises of plaintiff in error were searched by the sheriff under a search warrant and certain liquor was obtained. A motion was made by plaintiff in error to quash the search warrant and sequester the liquor taken thereunder. Both motions were denied and on the trial of the case the liquor was admitted in evidence. When this cause was in the Supreme Court a motion was made by the defendant in error to strike from the record the complaint and search warrant for the reason that they were not included in the bill of exceptions

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which was, by that court allowed. Subsequently plaintiff in error moved to file an additional record in the Supreme Court which was by that court denied. Since the cause has been transferred to this court no order has been entered allowing the motion to file the additional record. The question of the search warrant and its validity is not properly before this court. The only question, therefore left for the consideration of this court is whether or not error was committed by the trial court in the giving of instructions on the part of the defendant in error.

Instruction number 1, given on the part of the defendant in error is as follows:

"The Court instructs the Jury in the language of the Statute that the possession of liquors by any person not legally permitted under the Prohibition Act of the State of Illinois, to possess liquor, shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this Act. It shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only, provided such liquors were lawfully acquired and for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained therein; and the ~~burden~~ burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed and used."

On the trial the issue was submitted to a jury and the plaintiff in error introduced evidence disputing the facts charged against him in the information.

In *People vs. Tate*, 316 Ill. 52, the plaintiff in error was indicted for a violation of the Illinois Prohibition Act. Upon the trial of that cause an instruction was given very similar to the first instruction given on the trial of this case. At page 59 the court, concerning said instruction, said: "This instruction does not state the law and particularly the last part of it. The People again ignore the charge that they make in the indictment and conclude by saying that if the jury believe, beyond a reasonable doubt, that the defendant had in his possession intoxicating liquor he should be found guilty by the jury, unless they further

believe from the evidence that the defendant acquired the liquor in a legal manner. This placed the burden of proof entirely upon the defendant and was erroneous."

We want to emphasize again that it is improper in a case of this kind, wherein there is a contest on the evidence, under section 40 of the Prohibition Act, as to what constitutes a prima facie case, to inform the jury, in substance, that the defendant, if he makes a defense, must overcome the prima facie case. When a defendant goes to trial and introduces evidence disputing the fact charged in the indictment, it is a question then whether the evidence establishes a case against him of guilt beyond a reasonable doubt, and where there is such a contest in the evidence there should be no instruction whatever given as to what constitutes a prima facie case. On the contest the question is solely, have the People established the guilt of the defendant beyond a reasonable doubt? The giving of the first instruction on the part of the defendant in error constituted reversible error.

The judgment of the county court of Lee county is reversed and the cause is remanded.

Reversed and Remanded.

the defendant and the complainant.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 3rd day of June in the year of our Lord one thousand nine hundred and twenty-six

Justus L. Johnson
Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

242 I.A. 648

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 3 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

The People of the State of
Illinois,

242 I.A. 648

Defendant in error,

Error to the County Court
of Lake County.

vs.

James Fallon and Joseph Horen,
Plaintiffs in error,

Jett, J.

The State's Attorney of Lake county on November 2nd, 1925, filed an information consisting of two counts, in the county court of said county, charging James Fallon, Fred Eaton and John Doe with violating the Prohibition Law by transporting and possessing intoxicating liquor. After the filing of the information a warrant was issued and James Fallon and Fred Eaton were arrested and also the plaintiff in error, Joseph Horen, under the John Doe information. The record discloses that the latter's name is sometimes given as Horen and sometimes given as Horn. It further shows he is sometimes called Joseph and sometimes Joe. A nolle was entered by the State's Attorney as to Eaton. The plaintiffs in error, namely, the said James Fallon and the said Joseph Horen were found guilty by a jury and judgment was entered upon the verdict, and they were, and each of them was, sentenced to the county jail of the county of Lake for a period of ninety days and that each pay a proportionate part of the costs. They both prosecute this writ of error.

It is insisted that Horen was not charged with any offense. He appeared in court in person and by his attorney and was furnished with a copy of the information and pleaded not guilty. On the trial he was identified by a witness as being one of the parties present on the night in question where the liquor was to be delivered, and it was conceded by the attorney for the plaintiff in error that his name was Joseph Horen.

the local of the state of
Illinois,
Defendant in error,
James Wilson and Joseph Brown,
Plaintiffs in error,

Sett, 1.
The state's attorney of Lake County, Illinois, filed an information charging of the defendant, James Wilson, with violating the prohibition law by keeping a place of sale of beer and wine. After the filing of the information, the defendant and James Wilson and Joseph Brown were arrested and taken to the Lake County Jail, where the defendant was held. The record discloses that the defendant's name is James Wilson and sometimes given a name. In the record of the case, called upon and sometimes for. The defendant is known as James Wilson and the said Joseph Brown are known as Joseph and John and was arrested with the defendant, and that one of them was, sentenced to the county jail for a period of ninety days and that they pay a fine of \$100.00 each. They both prosecuted the case. It is limited to the fact that the defendant and Joseph Brown appeared in court in person and in the defendant and Joseph Brown a copy of the information and affidavit was filed. The defendant was identified by a witness as being one of the persons who was the right in question where the liquor was to be sold. The right was conceded by the attorney for the defendant in the case. The name was Joseph Brown.

The evidence shows that James Valentine was engaged in the bootlegging business on a very large scale and that in his line he did business with the notorious Genna gang of Chicago. Plaintiff in error Horen became aware of the business of Valentine and on or about October 24th, 1925, purchased a quantity of liquor from him. Later on he made an arrangement with Valentine for the purchase of one hundred gallons more and directed that it be taken to a certain point on a public highway in Lake county where it could be delivered. When Valentine and his wife and son and his brother and the latter's wife went to the designated place to make the delivery of the one hundred gallons of liquor they found plaintiff in error Horen. Almost immediately there appeared plaintiff in error Fallon who was a state highway policeman and who was in company with Eaton. It is the contention of Fallon that he discovered the liquor and placed Valentine and Horen under arrest. That they were arrested is denied. At any rate the testimony shows that they were not placed in custody. Fallon took the liquor with him claiming that he had it pursuant to his authority as an officer. He also claims that he notified the state's attorney of Lake county of his seizure of the liquor.

Catherine Valentine, wife of James Valentine, testified that she told them she could probably get \$50.00 to give them but not to keep the liquor; that she was talking to Fallon; Fallon said we will go 50-50 and that he wanted \$50.00; that he was working out of Springfield; that they were not arrested by Fallon.

On the night in question the police of North Chicago were called. When two of them arrived Valentine explained the situation. Fallon insisted that he had taken the liquor as an officer and this fact was not then disputed by Valentine. The police officers refused to aid Valentine and left the liquor in the possession of Fallon. Valentine then reported the seizure to the sheriff. The sheriff obtained a search warrant and obtained forty gallons of liquor from Fallon but no trace of the remaining sixty gallons could be had. It is the contention of the People that Fallon is a high-jacker and

that it was planned by him and Foren to obtain the liquor for their own purposes. The evidence tends to support such contention.

Eaton, against whom the nolle was entered, was called to the stand as a court witness without any showing to predicate it upon. This has been assigned as error. From what is disclosed by the record we are of the opinion the court did err in not requiring a showing to be made as a reason why Eaton should be called as a court witness. But taking the case altogether the guilt of the plaintiffs in error ~~is~~^{is} so conclusively shown that we are not inclined to disturb the verdict because of this error.

The record does disclose however, that the attorney for the plaintiffs in error at the time Eaton was called to the stand among other things stated that he had no objection to his testifying if Eaton was not to be prosecuted. Eaton was not prosecuted.

When Eaton was on the stand testifying he was interrogated concerning statements which he had made outside of court that were in conflict with statements he made while on the witness stand. This it is insisted by plaintiffs in error was erroneous. We are of the opinion that the court committed error in permitting Eaton to be interrogated concerning statements he had made outside of court that were in conflict with statements he made on the trial. It appears that some of these statements were used by the state's attorney as proof of substantive facts. It is insisted by plaintiffs in error that the testimony of this witness with reference to the statements he made out of court was not competent to prove any substantive facts against them and this is true, but for reasons we have already indicated this error is not considered by us as sufficient to reverse the judgment.

We are not unmindful of the fact that there is a conflict in the testimony. The jury saw and heard the witnesses and we think the jury was authorized to find as they did and therefore the judgment of the county court of Lake county will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT }ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 3rd day of
June in the year of our Lord one thousand
nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

242 I.A. 648

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
JUN 19 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

242 I.A. 648

Ida Bell,

appellee,

Appeal from the Circuit Court

vs.

of Winnebago County.

Fred W. MacDonald, Kathryn

A. Fay and Joseph P. Bell,

appellants,

Partlow, P. J.

Appellee, Ida Bell, filed her bill in the circuit court of Winnebago County, against appellants, Fred W. MacDonald, Kathryn A. Fay, and Joseph P. Bell, praying for a dissolution of a partnership, and for an accounting of the assets. Appellants filed an answer denying that appellee was a partner, or that she was entitled to the relief sought. There was a hearing before the chancellor, a decree was entered in accord with the prayer of the bill and this appeal was prosecuted.

The evidence shows that Joseph P. Bell, who was the husband of appellee, Ida Bell, was a tinner and sheet metal worker. He had worked in Omaha, Nebraska, from September 1, 1922, until January 14, 1924. He testified he sent to his wife \$35 each week during that time, He and his wife later went to Rockford, and on January 15, 1924, Bell went to work for MacDonald and Mrs. Fay, who were partners operating the MacDonald Sheet Metal Company. Mrs. Fay kept the books and MacDonald attending to the shop. They desired to get a competent sheet metal worker who would stay in their business and have steady employment, and offered Bell a one-third interest in the business for \$600 if he would stay with them permanently. Appellee testified that her husband came home one evening and told her that MacDonald wanted him to buy a one-third interest. She asked him why he did not buy it, and he replied that he did not have the money. Appellee told him she had some money saved up and would put it into the

business so as to assure him steady work, together with their son David.

On February 2, 1924, there was a meeting at MacDonald's house. There were present appellee and appellants, David Bell, a son of appellee, Violet Bell, wife of David Bell, and Ada MacDonald, mother of Fred . MacDonald. Mrs. Fay explained the manner in which the business had been conducted and the amount of business they were doing each month. The evidence on behalf of appellee is that appellee said to MacDonald that she had the money and would buy the one-third interest herself for \$600, and Bell could do the work; that MacDonald replied that it was all right, and Mrs. Fay nodded her head affirmatively.

Appellee had about \$300, and tried to borrow the balance but could not do so. She paid \$325 on February 2, 1924, \$30 on February 18, 1924; \$35 on March 3, 1924; \$50 on February 11, 1924; \$40 on March 11, 1924, and \$120 on February 20, 1925. Receipts were given in her name for each of the first five payments which stated that the amount received was to apply on a one-third interest in the firm of MacDonald's Sheet Metal Company. The last receipt for \$120 was given in her name and stated that it was in full payment of one-third interest sold to Mrs. J. P. Bell. Each receipt was signed by MacDonald and Mrs. Fay. Appellee testified that the \$600 was paid from money she had earned working at a dry cleaning and pressing plant. She received a statement from Mrs. Fay which showed that the assets for 1924 were \$5063.15, and for 1925, were \$6233.84.

The evidence further showed that appellee never attended any meetings of the company after February 2, 1924; never signed any obligations as a partner; and on the letter head used by the company the names of MacDonald, Bell and Mrs. Fay appeared. The company borrowed money and the notes were renewed from time to time signed by the three appellants.

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Appellee roomed in the same house with Elizabeth Keeling, who testified that appellee told Mrs. Keeling that her husband was a partner in the company. C. C. Smith, who had been engaged in the cleaning and dyeing business for many years, and for whom appellee worked, testified that she told him that her husband was the partner. Both of these statements are denied by appellee. In February, 1925, a lawyer was called to the office of the company to draw a partnership contract. The three appellants were present and Bell telephoned for his wife and she later came to the meeting. Bell stated that the reason for the contract was that he wanted a working agreement. A contract was drawn which recited that it was made between Fred W. MacDonald, Kathryn Fay and Joseph P. Bell, authorized agent of Ida Bell; that Fred W. MacDonald, Kathryn Fay and Joseph P. Bell, agent for Ida Bell, would become and remain partners in the business. Appellants again denied that appellee was a partner, or had any interest in the business. This contract was prepared but never signed. After this meeting appellee paid the balance of the \$600, which amounted to \$120, and received the receipt which stated that it was the balance in full for the one-third interest sold to Mrs. J. P. Bell.

The only question upon this appeal is whether or not this evidence was sufficient to justify the chancellor in entering a decree finding that appellee was in fact the person who purchased the one-third interest, and therefore, was entitled to an accounting. It appears from this evidence that the money was in fact furnished by appellee. Her husband would have it understood that part of it came from his earnings, but as the evidence shows that appellee also worked, we are of the opinion that the evidence was sufficient to show that she furnished the money that purchased this interest. The interest was purchased for the purpose of giving her husband and son steady employment. Appellee did not

attend the business meetings of the firm and did not sign any of the financial obligations, but this did not prove that she did not furnish the money, and was not a partner in the business. When the time came to enter into the written contract she was called to attend this meeting. If she was not a partner, and had no interest, it is difficult to understand why appellants sent for her to attend this meeting. It certainly was evidence of the fact that she had some interest. When the written contract was drawn, appellants specified that the husband was her agent. If she had no interest in the partnership, the contract would probably not have mentioned her. The contract was not executed, but after it had been drawn, appellee paid the balance due upon the contract and received a receipt in full which recites that the interest was sold to her. After appellee filed this bill to establish her rights and for an accounting, she and her husband separated and were not living together at the time of the trial. The chancellor saw the witnesses and heard them testify and we are of the opinion that the evidence fully sustains the decree. It will be affirmed.

Decree affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT }ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

242 I.A. 648

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 19 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Otto B. Bensen,

appellee,

Appeal from the Circuit Court
of Will County.

vs.

H. W. King,

appellant,

242 I.A. 648

Partlow, P. J.

Appellee, Otto B. Bensen, began an action of forcible entry and detainer in the circuit court of Will county against May T. Mitchell, administratrix of the estate of Hugh J. Mitchell, deceased, the H. J. Mitchell Company, and appellant H. W. King. There was service on all of the parties to the November term, 1925. On the third day of that term, which was November 18, 1925, all of the defendants were defaulted on account of a failure to enter their appearance as required by the rules of court, and a judgment was entered against all of them for the possession of the premises described in the declaration. Later appellant, King, filed a motion to set aside the default, and for leave to plead. In support of this motion he filed an affidavit. The motion was heard on January 15, 1926, during the January term of court, and was denied. On February 10, 1926, which was also during the January term, appellant filed his motion to quash the writ of possession, and vacate the judgment of November 18, 1925. This motion was denied on February 20, 1926, and this appeal was prosecuted.

The questions presented in this case are argued by appellant upon the theory that the appeal was from the judgment entered at the November term. The additional abstract filed by appellee, shows that the appeal was from the order and judgment of February 20,

1926, denying the motion to quash the writ and to stay service thereof, and to vacate the judgment; and from the order of January 15, 1926, denying the motion to vacate the default. It does not appear from the order of appeal that there was any appeal from the

judgment which was entered at the November term, therefore the validity of that judgment is not before us and we will consider this as an appeal from the order refusing to vacate the default and to quash the writ.

It is a well known rule of law that the party seeking to have a default set aside must show that he acted with due diligence to protect his rights, and that he has a meritorious defense to the cause of action. *Nitsche vs. City of Chicago*, 280 Ill. 270; *Hillenbrand vs. Hillenbrand*, 211 Ill. App. 624. The affidavit will be construed most strongly against the party making the application. *Great Western Hat Works vs. Pride*, 224 Ill. App. 250; *Hallin vs. Penney*, 209 Ill. App. 231.

The affidavit filed by appellant falls far short of complying with this rule of law. It does not show that appellant was diligent, but that he waited to see whether other defendants filed their appearance in the case. At the time the default was entered the court examined the files and called the attention of the clerk to the default and it was determined that there had been no entry of appearance as provided by the rules of court, thereupon the court entered the order defaulting the defendants and rendered judgment. Not only is there nothing which shows any diligence but there is nothing to indicate that he has a meritorious defense to the cause of action. If he was improperly defaulted, and he had no defense to the cause of action, the court might properly refuse to set aside the default and judgment.

If the judgment was properly entered, there can be no objection to the writ of possession which was issued upon the judgment. It is insisted by appellant that the judgment is against an administrator and was therefore improperly entered. The administrator is not complaining of this action of the court, but the complaint is entirely upon the part of the appellant. He has no interest in the fact that the judgment may be against the administrator,

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he is not injured thereby.

We have considered this case upon its merits. We would be justified in affirming the judgment for the reason that appellant has not filed an abstract as required by the rules of this court. The abstract is a mere index to the bill of exceptions and record. None of the principal documents are abstracted. It is difficult to determine the nature of the action and the names of the parties from the abstract as filed. We have often held that this court is not called upon to search the record to reverse a judgment in which appellant does not comply with the rules of court.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

Abstract only

. AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

242 I.A. 648

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 25 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Charles F. Brown, Sr.,
Administrator of the Estate
of Charles F. Brown, Jr.,

appellee,

Appeal from the Circuit Court
of Peoria County.

vs.

Illinois Power & Light Corporation,

appellant,

242 I.A. 648

Partlow, P. J.

Appellee, Charles F. Brown, Sr., administrator of the estate of Charles F. Brown, Jr., deceased, began suit in the circuit court of Peoria county against Dietrich Becker, and appellant, Illinois Power & Light Corporation, to recover damages for the death of appellee's intestate. Becker died prior to the trial and the suit was dismissed as to his estate. There was a trial by jury, judgment against appellant for \$2500, and this appeal was prosecuted.

Prospect avenue extends north from the City of Peoria to and through the village of Peoria Heights, where it intersects Seiberling avenue which extends east and west. Appellant had a single track street railway in Prospect avenue from the City of Peoria to and through the village of Peoria Heights. At Seiberling avenue there is a single track which extends from the track in Prospect avenue on a curve to the northeast and then in an easterly direction in Seiberling avenue. Cars on these respective lines were operated with block signals. There was a block signal on a post in Prospect avenue a short distance south of Seiberling avenue. A car going north on Prospect avenue, when it entered that block, caused a red light to appear in the block signal so that the car going west on Seiberling avenue would be warned and would stop on the switch at the intersection and wait until the north bound car had passed.

On July 6, 1923, car Number 361 was going west on Seiberling avenue. It was to turn south on Prospect avenue and go to the city of Peoria. When this car was on the curve at the intersection, a red light flashed in the block signal south of Seiberling avenue,

indicating that a car was approaching from the south on Prospect avenue, and the motorman of car Number 361 stopped his car. There were passengers waiting to take the south bound car, and the motorman of car Number 361 let these passengers onto his car. He then backed his car in a northeasterly direction onto the switch into Seiberling avenue far enough so that its front end would permit the north bound car to pass. There is some conflict in the evidence as to the exact position which the car occupied on the switch. It remained on the switch a few minutes, and while it was standing there appellee's intestate, a boy about six and one-half years old, with his sister, about four years old, started hand in hand from the southeast corner of the intersection and walked or ran west across Prospect avenue, it being their intention to cross Prospect avenue to the west side and then to cross Seiberling avenue to a store on the northwest corner of the intersection. As the children were crossing Prospect avenue, an automobile driven by Becker approached from the north and struck appellee's intestate, injuring him so that he died shortly thereafter.

It is claimed by appellant that there was no marked pathway from the southeast corner of the intersection west across Prospect avenue to the southeast corner of the intersection, and that Prospect avenue was unpaved, except a part of the roadway east of the north and south track.

It is claimed by appellee that at the time of the accident, the street car was standing approximately east and west, headed slightly southwest, on the curved switch track, along and over the cross walk which went from the southeast corner to the southwest corner of the intersection, and that it had been there about five minutes; that Prospect avenue was paved with macadam about 12 feet wide east of the track, and that the front end of the street car was upon the macadam to such an extent that an automobile traveling south had to go off the west side of the macadam to pass the car; that the front end of the car was a short distance east of the p

roadway; that when Becker approached the car he brought his automobile almost to a stop, and did not pass it until the motorman motioned to him to go around the west end of the car; that Becker then turned off of the macadam and went around the car. There is also evidence tending to show that Becker drove his automobile south at the rate of 18 or 20 miles per hour.

The declaration consisted of four counts. The first count charged the operation of the car line, the movements of the deceased practically as above stated, and charged that appellant negligently stopped its car on the track in said intersection and thereby obstructed the view of deceased; that Becker negligently drove his automobile past the west end of the car standing on the curve, and that ²though the negligence of all of the defendants, the automobile of Becker struck the deceased and injured him to such an extent that he died.

The second count alleged that appellant negligently permitted its car to stand in the intersection and thereby obstructed the view of deceased, and that Becker negligently drove his automobile past the car in violation of the Motor Vehicle Act. It also charged general negligence against appellant.

The third count set up an ordinance of the village of Peoria Heights regulating the manner in which street cars should stop in the street; alleged that appellant, in violation of the ordinance, stopped its car in the intersection; and negatived the conditions stated in the ordinance which permitted the stopping of cars in the street; alleged that the car was left standing in the intersection in violation of the ordinance; that by reason thereof the car obstructed the view of the deceased of the automobile which was then and there being driven around the west end of the car, and in consequence of the obstruction of the view, the deceased passed around the end of the car, in front of the automobile, and was struck and killed.

Appellant urges as ground for reversal that the evidence does not show actionable negligence on the part of appellant; that the standing car, in alleged violation of the ordinance, was not the proximate cause of the injury; that the ordinance was not intended to protect the public against an obstructed view; that the evidence fails to show that the parents of the deceased were in the exercise of due care; that the court erroneously refused to strike from the record the evidence with reference to the date of the injury, which date did not correspond with the allegation of some counts of the declaration; that certain instructions were improperly refused.

The ordinance which was made the basis of the third count, provided that "no street car shall be allowed to stop on the cross-walk, nor in front of any intervening street, except to avoid collision, or to prevent danger to persons in the street, nor shall any car be left standing in the street, or highway, at any time, unless the same is waiting for passengers."

A violation of an ordinance of a city, even if proven, must, in order to be actionable, be the proximate cause of the injury complained of. *Curran v. Chicago & Western Indiana Railroad Company*, 289 Ill. 111; *Hartnett v. Boston Store*, 265 Ill. 331; *Fogelson v. Peoria Railway Terminal Company*, 203 Ill. App. 546. In order for there to be a recovery based upon the violation of this ordinance, the ordinance must have been intended to protect the public against an obstructed view. In *Wing v. Smith*, 190 Ill. App. 275, it was said: "To entitle the plaintiff to recovery because of a violation of a statute imposing a duty on the defendant, he must be within the class contemplated by the statute and within the purpose and protection for which the law was enacted. It is not sufficient to aver and prove the violation of a statutory duty by the defendant and consequent injury to the plaintiff, but it must further appear that the statutory duty violated was one

that the defendant owed the plaintiff." To the same effect are Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Halbert, 179 Ill. 196; Halbert v. Citizens Coal Mining Co., 149 Ill. App. 412; Carterville Coal Co. v. Moake, 128 Ill. App. 133; Rosan vs. Big Muddy Coal & Iron Co., 128 Ill. App. 125; Lumaghi v. Voytilla, 101 Ill. App. 112.

The purpose of this ordinance was not to prevent an obstruction to the view, but it was to prevent street cars from obstructing traffic in the street and the dangers incident thereto. Even if it be conceded that the ordinance could properly be made the basis of an action for negligence, the evidence shows that appellant did not violate the ordinance for the reason that the car was stopped on the crossing, and in front of an intervening street not only to take on passengers, but for the purpose of avoiding a collision with the car going north, and it was therefore within the terms of the ordinance and not in violation of it. The evidence was not sufficient to sustain a judgment based upon a violation of the ordinance.

The next question is whether or not appellant was guilty of negligence by reason of the fact that the car was standing upon the track, and obstructed the view of the deceased of the automobile coming from the north.

On behalf of appellant, it is claimed that if the negligence complained of did nothing more than furnish a condition, by which the injury was made possible, and that the injury was caused by the independent act of a third person, the creation of the condition is not the proximate cause of the injury. In support of this contention a long line of cases are cited, including Devine v. Chicago and Calumet River R.R. Co., 259 Ill. 449; Seith v. Commonwealth Electric Co., 241 Ill. 252; Hartnett v. Boston Store, 265 Ill. 331.

Appellee claims that if the injury resulted from the negligent act of appellant, it is no defense that the negligence of a third

person also contributed to or caused the injury. In support of this contention many cases are cited, including Fisher v. Chicago, Rock Island & Pacific Railroad Co., 290 Ill. 49; Brunnworth v. Kerens Coal Co., 260 Ill. 202; Ford v. Hind Bros. Co., 237 Ill. 463.

It must be conceded that the authorities cited correctly state the law. The question is whether the facts appearing in evidence establish the liability of appellant. In determining this question it is of the utmost importance to have a clear idea of the situation at this intersection. The plat offered in evidence shows that Prospect avenue was 85 feet wide from curb to curb. The west rail of the street car track was 11 feet and 5 inches east of the west curb of the street. The track was 4 feet, 8 inches wide. East of the track was a dirt, cinder and rock path 8 feet, 4 inches wide. East of the path was a macadam road which was 22 feet wide at the intersection, and 13 feet wide north and south of the intersection, the west edge of the pavement being a straight line and the additional width at the intersection being to the east and extending into the intersection. East of the macadam road was an unpaved road 47 feet and 7 inches wide next to the east curb of the street north and south of the intersection, and at the intersection this dirt road was 38 feet and 7 inches wide. The street car was 40 feet long.

When the motorman on car number 361 reached the intersection he ran his car out into the intersection until it was near the north and south track. The signal light flashed and he stopped the car, took on certain passengers, and backed up so as to permit the north bound car to pass. There is a conflict in the evidence as to just how far he backed his car east of the north and south track. According to three witnesses who testified on behalf of appellee, he backed it at least 24 feet east of the west curb of the street. Another witness testified that he backed it 54 feet east of the west curb. Another witness put it 35 feet east of the west curb, and the motorman and one other witness testified that the front end of the car

cleared the east edge of the pavement three to five feet which would make it about 50 east of the west curb.

The block signal light was about 150 feet south of the intersection. The motorman of car 361 could not see this light until his car had passed the east line of Prospect avenue, for the reason that the building at the southeast corner of the intersection obstructed the view. He testified that when he stopped his car on seeing the light, the front end of the car was one or two steps from the east rail of the track on Prospect avenue; that the car moved about ten feet after he saw the red light flash. At that time the north bound car was just south of Kelly avenue which was the first east and west street south of Seiberling avenue. Just how far it is from Kelly avenue to Seiberling avenue is not shown by the evidence, but it is apparent that it is not very far as witnesses on the front end of the north bound car testified that they saw the automobile strike the deceased. The deceased was struck before the north bound car reached Seiberling avenue. Under this evidence it is apparent that car 361 had only been standing in the intersection a very short time. The motorman of car 361 backed up after the signal light flashed, and at the time of the accident his car was at least 24 feet east of the west curb, and the preponderance of the evidence is that it was at least 35 feet east and some of the evidence is that it was about 50 feet east of the west curb. Under all of these facts we do not think it was the duty of the motorman to back his car east of the east line of Prospect avenue. He knew that the north bound car would pass the intersection in a very short period of time. Car 361 was lawfully in the street and all the motorman was required to do was to back his car a sufficient distance so as to allow the north bound car and traffic to pass. The automobile straddled the east rail of the track in Prospect avenue and there was a space of 8 feet, 4 inches, between the east rail

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and ~~was~~ west edge of the macadam, and a space of 16 feet between
the west curb and the east rail, both of which were sufficient
for unobstructed travel.

Under all the evidence we do not think appellee established
b. the greater weight of the evidence that appellant was guilty of
any act of negligence charged in the declaration. The most that
can be said against appellant is that the car standing on the
switch created a condition by which the injury was made possible,
and that the injury was caused by the independent act of a third
person. The creation of the condition was not the proximate
cause of the injury. The verdict and judgment are contrary to
the manifest weight of the evidence and for that reason will
have to be reversed. It will not be necessary to consider any
of the other errors assigned.

Reversed and Remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 25th day of
June in the year of our Lord one thousand
nine hundred and twenty six

Justus L. Johnson
Clerk of the Appellate Court

Abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

242 I.A. 648

BE IT REMEMBERED, that afterwards, to-wit: On
JUN 25 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

John Severson,

appellee,

Appeal from the Circuit Court

vs.

of Grundy County.

The American Insurance Company,

a corporation,

appellant,

242 I.A. 648

Partlow, P. J.

Appellee, John Severson, obtained a judgment for \$2103.14 in the circuit court of Grundy county against appellant, The American Insurance Company, on account of a loss under a policy of fire insurance, and an appeal has been prosecuted to this court.

Appellee, a Norwegian, was a tenant farmer in Grundy county. He came to this country when he was about seventeen years old. He had very little, if any, education, and testified that he could not read English, and could write but very little. His wife and children assisted him in his business. For about 22 or 23 years he had been insured by appellant, all of the policies having been placed through James Darling, an agent of appellant. Appellee had a policy of fire insurance on his horses, tools, livestock and grain, located in his barn, which policy expired on April 15, 1924. A few days before the policy expired Darling called on appellee to renew the policy. An application was made for a policy of \$5200.00, and a note for the premium for \$101.40 due July 15, 1924, was attached to the application. Appellee testified that he told Darling when the application was made that he was going to pay cash and he called his wife to bring his check book but Darling advised him to pay the premium by a note. Appellee said he might not have the money on July 15, and asked what would happen in that event. Darling said his policy would be good as gold. Appellee said it might be threshing time before he would have the money but Darling answered that his policy would be all right except he would have to pay additional interest from April 15, just as he had done before; that a similar

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statement was made to him by Darling after the policy had been delivered.

The policy provided that appellant should not be liable for any loss while any note given for the premium remained due and unpaid. In case of default in payment of any note the whole premium should be deemed fully earned and should at once become due and payable, and the collection thereof should, in no case, revive or create any liability against the company for loss accruing while the assured was in default; that the payment of the premium in full should revive the policy and make it good for the balance of the term. The policy further provided that no agent or employ of the company, except the western manager, in writing, should have power or authority to waive or alter any of the terms or conditions of the policy. Endorsed on the back of the policy was the following: "Notice to policy holder. Agents of this company are not authorized to waive or alter any of the terms or conditions of this policy." Appellee also testified that when Darling took the application he told appellee that if he could not pay the note at maturity, and appellee would let Darling know a week or so ahead of time he would write to appellant for an extension.

Four or five days after the application was made appellee received the policy. Appellee testified that in April he was in the city of Ottawa and met Darling who asked him if he had received his policy. Appellee replied that he had and that he wished he had paid cash for it and had it all cleaned up. Appellee again asked Darling if it would be all right if he did not have the money before threshing, and Darling replied that it would, but that appellee would have to pay six per cent interest if the note was not paid on July 15.

About thirty days prior to the maturity of the note appellee received a notice from appellant that his note would fall due on July 15, and that a copy of the conditions of the policy with reference to payment of premium would be found on the back of the notice.

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any liability against the company for loss occurring while the person
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ing, and the policy provided that it would be valid and that it would be valid
to pay six per cent interest if the policy was not paid on July 15.
About thirty days prior to the maturity of the policy, the person
received a notice from the person who called him that his note would be paid on
July 15, and that a copy of the conditions of the policy was being
sent to the person of the person who called him on the back of the policy.

The loss occurred on August 4, 1924, and no question seems to be raised as to the amount thereof. Immediately after the fire appellee called Darling at Ottawa. Darling went to appellee's farm. Appellee testified that they figured up the loss and Darling said he would send a statement to the company; that Darling told two men to appraise the horses which had been burned and they were appraised; that Darling said a settlement would be made within a short time; that Darling asked appellee if he had paid the note and upon being advised that the note had not been paid, Darling filled out a check from appellee's check book and the same was signed by appellee, dated August 3, 1924, the day before the fire and two days before it was made out. This check was put in an envelope and mailed to the company that day by Darling as he went through Seneca on his way to Ottawa. Appellee also testified that Darling at that time offered to give appellee a check for \$1000.00 to cover part of the loss. Upon receiving notice of the loss appellant denied liability and returned the check to appellee.

On behalf of appellant the evidence shows that the day after the fire, appellee notified Darling, and Darling went to appellee's place, and learned for the first time that the note had not been paid; that appellee asked if it would do any good to pay the note then and Darling replied that it would not, but appellee kept asking him if it would not be all right to send in a check and Darling finally told him he might try it. Darling filled out a check, appellee produced the notice from appellant, the two were placed in an envelope and mailed by Darling on his way home. The check was actually made on August 5, but was dated August 3. When Darling reached his home he made out and mailed to appellant a report of the loss.

As ground for reversal it is urged by appellant that the non-payment of the premium note suspended the policy so that at the time of the loss appellee had no insurance; that it was error to admit parol evidence to vary the terms of the written policy; that Darling

was only a soliciting agent of appellant, and as such had no authority to extend the time of payment, or waive any provisions of the policy; that Darling did not extend the time of payment or waive the provisions of the policy.

On behalf of appellee it is contended that the non-payment of the note did not suspend the policy because appellant, though its agent, extended the time of payment, thereby waiving the suspension clause and estopping appellant from setting up the suspension clause in defense of this suit; that parol evidence as to the extension and waiver of appellant though its agent was competent; that Darling was a general agent of appellant and had full power and authority to waive the time of payment or waive the provisions of the policy; that Darling did extend the time of payment and did waive the suspension clause.

Most of the questions which are raised by the respective parties are questions of fact to be determined by the jury from the evidence introduced. As this case will have to be submitted to another jury, we will not consider any questions of fact, and will only pass upon those questions which will be of assistance on another trial.

It is insisted that the court improperly admitted evidence which varied the terms of the written policy. This contention is based upon the alleged conversations between appellee and Darling at the time the application was made, and on another occasion in Ottawa after the policy had been issued. We do not think appellant is correct in claiming that this evidence was admitted for the purpose of varying the terms of the written contract, but on the contrary the evidence was admitted for the purpose of showing that the provisions of the policy had been waived by Darling. If Darling was a general agent of the company and was clothed with authority to solicit insurance, collect premiums, forward the same, receive and deliver policies, he had power to waive the conditions of the policy which were for the benefit of the company. Milwaukee Mechanics'

Insurance Co. v. Schallman, 188 Ill. 213; Hancock Life Insurance Co. v. Schlink, 175 Ill. 284; Phoenix Insurance Co. v. Stocks, 149 Ill. 319; Phoenix Insurance Co. v. Hart, 149 Ill. 513; Todd v. Prudential Insurance Co., 201 Ill. App. 405. There was evidence tending to show that Darling came within the rules of law announced in the cases cited. Under these circumstances the evidence with reference to a waiver was properly admitted.

Appellant sought to offer in evidence a copy of a written certificate of appointment of Darling as its agent. Darling testified that the original had been given to him by appellant and that it had been lost. The court refused to permit appellant to show the copy to the witness and have him identify it so as to lay the foundation for the introduction of the copy. In this the court was in error and appellant should have been permitted to lay the proper foundation for the admission of the copy.

The first instruction on behalf of appellee told the jury that if they believed from the evidence that the defendant authorized Darling to solicit applications, take premium notes, collect premiums, deliver policies, and extend premium notes, and that the agent told appellee he could have until after threshing to pay the note, and appellee relied upon such statement, then appellant would be estopped to set up the non-payment of the note as a defense. The third instruction, among other things, told the jury that if they found from the evidence that Darling had, prior to the execution of the policy in question, in his dealings with appellee, extended the time of payment of premium notes, and if they further found from the evidence that the defendant ratified and approved such extension, that their verdict should be for plaintiff. The objection to both of these instructions is that there was no evidence that appellant ever authorized Darling to extend premium notes, and that there is no evidence that the time of payment of any premium note had ever been extended. Appellee testified that he had, on previous occasions,

paid Darling notes which were past due and that the policy was not cancelled on account of such failure to pay the premium note when due. Under the authorities it was not necessary in order for appellee to recover that Darling should have extended prior premium notes. All that was necessary was that appellee should prove that Darling was a general agent of appellant; that he had authority to solicit insurance, collect premiums, receive and deliver policies. There was evidence on which to base the first and third instructions and there was no error in giving either of them.

The second instruction told the jury that if they found in favor of the appellee, in fixing his damages, they should allow him the actual cash market value of the property destroyed. It is insisted that this instruction is mandatory and should not have been given. There is apparently no controversy as to the amount of the damages, therefore there could be no reversible error in the giving of this instruction. Instructions quite similar to this one, mandatory in character, have not been held to constitute reversible error.

There is considerable complaint by appellant of various incidents in the record of improper statements and misconduct during the trial. It will not be necessary to go into detail with reference to each of them. It is sufficient to say that in almost each instance the complaint made by appellant was justified and that many things were said and done which should not have been permitted. If these were the only errors complained of we might not feel justified in reversing the judgment, but ^{there} is one error which is sufficient to justify the reversal of the judgment and that is the improper argument of counsel to the jury on behalf of appellee. Counsel said: "Are you going home and have your friends and neighbors say - tell them it was a pretty slick company - they had pretty clever lawyers - they draw a foxy policy. There were funny things in that policy drawn by skilled lawyers with only one thing in view - to beat the

...with regard to the fact that the ...
...in order to ...
...the ...
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...and ...
...a ...
...evidence on which to base the ...
...was no error in ...

The second instruction ...
...of the ...
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...damages, ...
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...error, ...

There is ...
...in the ...
...the trial. It will not be ...
...to each of them. It is ...
...the complaint ...
...were told and ...
...were the only ...
...reversing the ...
...justifying the reversal of the ...
...ment of counsel to the ...

...are you going home and have your ...
...them it was a ...
...they draw a ...
...drawn by skilled lawyers with only one ...

unsuspecting person who relied upon their representations, out of his money. Take it to the jury room you men of ordinary business affairs of life, and decide whether you want to aid some high-priced lawyers, some designing insurance companies, to steal from the man who signed the application. You saw the representatives of the insurance company, Darling, the agent, the solicitor, highly skilled and highly trained in the subtle phrases and representations, and Mr. Foltz, the high-salaried manager of the loss department, holding his position for only one purpose, and that is his skill and knowledge of the ways in which the men of the class of John Severson can be beat out of the payment of the loss that they are entitled to. Slick, oily, greasy, clever men of the great city. They come down here and impose upon our trusting farmers. The manager of the loss department is not paid to pay losses. No, any common ordinary person could pay them, if he had the dough. Mr. Foltz, is a clever, designing man, paid by the company for the purpose only of when there is a technical defense that will beat the unsuspecting out of a nickel, it is his job to do it. If you find for the defendant you have said that any concern that writes insurance, and in their policies of insurance, insert cunningly drawn phrases in favor of the company, items of forfeiture, suspension, and so on, that you are going to enforce that, and it means that no man, or the court, or myself, are not safe, unless every time that they transact any item of business relating to insurance, that they go and employ counsel equal in skill to that employed by the American Insurance Company, and that you cannot do, because your policy would then cost you more than it is worth. Contracts of insurance are all on sided. They are not the result of negotiations between the insurance company and the person insured. They don't mean in common terms and conditions what you are told they mean. It is not the policy to say you give me this and I will give you that. No, each

insurance company presents and furnishes their agent with a printed contract, and you cannot sit there and think for a minute, that that contract was drawn in favor of the insured person. The cunningly phrased, drawn by men skilled in arts and artifices, can distort the English language so that no man can understand them. Now there is one other thing I want to show you. I want you to examine this. Take a fine tooth comb and a strong light and from this examination of this policy find what he is up against. Just the same as when they chased him up to Rockford to take a deposition last Friday. They served notice on John to come to Rockford. We got plenty of money, you spend yours they say. Come on up here- "

Throughout this argument objections were made to these remarks of counsel and in most instances the objections were sustained. It has been uniformly held that courts will reverse a judgment because of the improper conduct and prejudicial statements of counsel even though the trial court sustains the objections. Bishop v. Chicago Junction Railway Co., 289 Ill. 63; McCoy v. Chicago & Alton Railroad Co., 268 Ill. 244; Bale v. Chicago Junction Railway Co., 259 Ill. 476; Appel v. Chicago City Railway Co., 259 Ill. 561; Chicago & Alton Railroad Co. v. Scott, 232 Ill. 419. These cases cited cover every feature of the argument of counsel applicable to the facts here presented. We regret the necessity of being compelled to reverse this judgment but we do not feel that under the facts presented that appellant had a fair and impartial trial. It was the duty of counsel to argue this case upon the law and the evidence, and to omit all argument which was calculated to arouse the passion and prejudice of the jury.

For the errors indicated the judgment will be reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 25th day of

June in the year of our Lord one thousand
nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court

Abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

242 I.A. 649

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 30 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Perry D. Trimble,

appellee,

vs.

Harry A. Mills, Sheriff

of Bureau County,

appellant,

Appeal from the Circuit Court
of Bureau County.

242 I.A. 649

Jett, J.

This is a suit in replevin by Perry D. Trimble, appellee, against Harry A. Mills, sheriff of Bureau county, appellant, to obtain possession of certain grain, crops, live stock and farming implements mentioned and described in the replevin writ issued in this proceeding.

It appears that a judgment was obtained in favor of L. P. McMillan on July 25th, 1925, in the sum of \$3781.90 and costs of suit against Harry L. Graves. Execution was issued thereon and a levy made by appellant on the property involved in this cause.

Previous to the time of the obtaining of the judgment against Graves, he had executed a chattel mortgage upon the said property to appellee and that after it had been levied upon Trimble made a demand upon the sheriff for its return which was denied. This suit was then instituted, issue joined, and a trial had by the court without a jury. Propositions of law were submitted and the trial court found for appellee and against the appellant and this appeal followed.

The result of this case hinges upon the question of the validity of the execution and acknowledgment of the chattel mortgage of Graves to Trimble.

The record discloses that a typographical error was made in stating the name of the mortgagor in the body of the mortgage and in the acknowledgment, in both of which the name appears as "Harry S. Graves", while in fact the mortgage is signed by Harry L. Graves, who on the hearing of the cause testified that he executed it and

acknowledged it before J. R. Prichard, County Judge of Bureau county. The objection to the mortgage itself is that on the face of the acknowledgment the instrument appears to be acknowledged before a justice of the peace when in fact it was acknowledged, as is shown by the testimony, by J. R. Prichard, who at the time of the acknowledgment was county judge of Bureau county. There is no question about the entry of the chattel mortgage in the docket by the County Judge, nor of its being recorded in the office of the recorder of deeds in said county of Bureau. The County Judge failed to strike out the words "Justice of the Peace" in the printed form that was used and did not write his title "County Judge" under his signature.

Appellant insists that by reason of the statute in effect at the time of the execution of the chattel mortgage in question, namely, Section 2, of Chapter 95, Cahill's Revised Statutes, 1919 which is the revision of 1915, a county judge had no authority to take an acknowledgment of a chattel mortgage except when there is no justice of the peace in the township in which the mortgagor resided. That the mortgagor resided in a township other than that in which the county judge did there is no question. The sole question then to be determined in the construction of the statute is whether or not the county judge had the right to take the acknowledgment of the chattel mortgage if there was a justice of the peace in the township where the mortgagor resided at the time the mortgage was executed. Section 2 of said chapter 95, among other things provides: "Such instrument shall be acknowledged before a justice of the peace of the county or the county judge where the mortgagor resides," etc.

The question involved in this case is decided in the case of *Watkins v. Dunbar*, 232 Ill. App. 1. The effect of the holding in *Watkins v. Dunbar*, supra, is that a county judge was authorized to take an acknowledgment of a chattel mortgage under the Act of 1915, although there was a justice of the peace in the township where

the mortgagor resided at the time of the execution of the mortgage. The testimony establishes the fact that the chattel mortgage was acknowledged by the county judge of Bureau county.

The trial court properly held that the chattel mortgage was a valid and subsisting lien upon the chattel property described in the replevin writ.

The judgment of the Circuit Court of Bureau county is therefore affirmed.

Judgment affirmed.

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STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of June in the year of our Lord one thousand nine hundred and twenty six.

Justus L. Johnson
Clerk of the Appellate Court

Abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

242 I.A. 649

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
JUN 30 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Lillie E. Cross, administratrix
of the Estate of Robert Cross,
deceased,

appellee,

Appeal from the Circuit Court

vs.

of Kankakee County.

John Panozzo,

appellant,

242 I.A. 649

Jett, J.

Robert Cross, brought suit in assumpsit against John Panozzo, appellant, in the Circuit Court of Kankakee county to recover the sum of \$500 and interest thereon which was a part payment on a contract to purchase a tract of land from appellant. Robert Cross departed this life before the trial and Lillie E. Cross, administratrix, was substituted as plaintiff. A trial was had before the court without the intervention of a jury, and the court found for appellee and the appellant prosecuted this appeal.

The evidence upon which the cause of action is based shows that appellant entered into a contract with Robert Cross to sell him a certain tract of land which was unimproved for \$10,000. A cash payment of \$500 was made and \$5,000 was to be paid on March 1, 1924 and the balance of \$4,500 was to be secured by a trust deed upon the land. Appellant was to convey the real estate by warranty deed and clear of all encumbrances and in the case of a failure to complete the contract any sum paid was to be retained as liquidated damages by the appellant. A survey was to be made of the premises, the cost thereof to be paid by the parties to the contract and the settlement was to be on the basis of \$125 per acre.

The evidence shows that at the time the contract was entered into appellant did not have title to the real estate. All appellant had was a contract for the purchase of the land in controversy and other lands from a man by the name of Tupper, which had been in

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existence for a number of years and had a considerable length of time to run. The evidence further shows that Tupper died before the contract was entered into by the appellant with Cross and some of the heirs were infants. Nothing was done by appellant in the way of securing the title to the land from the time the contract was entered into with Cross, on the 25th day of June, 1923, before March, 1924. On March 1st, 1924, Cross had made the arrangements to complete the contract but the appellant did not have title and for that reason could not complete the transaction. Because of the inability and failure of appellant to convey on March 1st, 1924, Cross about the 15th day of said month, terminated the contract and commenced this suit to recover the \$500.

It is insisted by the appellant that the time of conveyance was not of the essence of the contract. The contract of June 25th, 1923, between appellant and Cross expressly provides that the time of payment shall be of the essence of the contract. Appellant insists that this language refers only to payment and that though Cross was bound to make payment of \$5,000 and give a trust deed for the balance on March 1st, 1924, it has no application relative to the time of making conveyance. Under the contract in question the payment of the balance of the purchase price and conveyance of the title are mutual and concurrent acts. *Smith v. Lamb*, 26 Ill. 397,

And though the contract provides, "If the party of the second part shall first make the payment, etc.," yet the act of payment and the conveyance are held to be mutual and concurrent and neither party can default the other unless he is himself in a position to comply with his contract. *Eggers v. Busch*, 154 Ill. 604.

Harding v. Olson, 177 Ill. 298, was a suit on a contract similar to the one under consideration and the court at page 304 said: "The contract expressly provided the failure of the appellee to make either of the payments, or any part thereof, or to perform any of the covenants on his part made and hereby entered into, should

authorize the appellant to declare the contract forfeited, and that all payments made by the appellee on the contract should be forfeited to and retained by the appellant in liquidation of the damages sustained by him by reason of the failure of the appellee to fulfill his undertaking, and the contract further provided that the time fixed for any payment to be made should be deemed as of the essence of the contract. A contract which thus, by express terms, imposes upon one of the parties to it a forfeiture of all rights under it as a consequence of a failure to comply literally and strictly with his obligations, in the absence of imperative reasons ought not be so construed as that the other party to it would be allowed such an unreasonable length of time after a breach upon his part in which to perform that which the contract required of him."

If the payment and conveyance are mutual, concurrent and simultaneous acts, and time of payment is made of the essence of the contract, it follows that time of conveyance must also of necessity be of the essence of the contract. There is an additional reason why this phrase should be so construed. The contract provides that on March 1st, 1924, Cross should pay \$5,000 and give a trust deed to secure the balance. No trust deed could be given until conveyance was made to Cross. Cross was not bound to pay the \$5,000 and give a trust deed until the premises contracted for were conveyed to him. Until the conveyance to Cross he had no title to the land upon which to execute a trust deed to secure the balance of the purchase price.

Appellant merely had a contract for a deed which ran for more than 20 years. He therefore was possessed of the information that he must take some steps prior to March 1st, 1924, in order to place himself in a position to comply with his contract with Cross, and as Tupper had died in 1922, long before the contract was entered into with Cross, appellant knew he would be unable to comply with his contract unless he paid for the land for which he had contracted and secure a deed therefor.

In *Byra v. Thomas*, 186 Ill. App. 281, at 284, the court used language which is applicable here when it said: "We are of the opinion that the title of appellant was so materially defective at the date of the contract as to be unmerchantable; that this should have been known by appellant at least by September 1st, 1905, when he agreed to furnish appellee the abstract; that the defects were of such a character that he should have known a proceedings in court was necessary to make the title merchantable; that he could and should have filed a bill for that purpose to the October Term of court; that failing to do that he should, in his bill filed to the March Term, have made all necessary parties; having failed to do this he should not complain if appellee was disinclined to take the title and possession July 26th, instead of the 1st of March." Knowing that he did not have title to the premises he contracted to sell Cross, appellant failed within a reasonable time to place himself in position to be able to comply with his contract. While holding on to his contract with Typper so as not to lose the advantageous terms of payment it offered, he also insists on holding on to the \$500, paid by Cross who received nothing for his money though he was ready and willing to carry out his contract.

It is also urged that the rescission of the contract was invalid because the appellant was not placed in statu quo nor was any offer made to do so. The evidence shows that the land was vacant and unimproved; that Cross fixed the fences, planted trees and otherwise improved the property. The only possible claim that could be made would be that the estate of Cross should be charged for the use and occupancy of the premises. There is no holding nor evidence in the cause which sustains this contention and the judgment cannot be reversed on that account. Lastly it is urged that the evidence is insufficient to sustain the finding and the judgment. There is no merit in this contention and we are of the opinion that the trial court committed no reversible error in finding for appellee.

Therefore the judgment of the Circuit Court of Kankakee county
is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 30th day of
June in the year of our Lord one thousand
nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court

Abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

242 I.A. 649

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 30 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Irene Guymon, by John

Guymon, her next friend,

appellant,

vs.

Edmond Franey and John

Franey,

appellees,

Appeal from the Circuit Court

of Livingston County.

242 I.A. 649

Jett, J.

This suit was instituted for Irene Guymon by John Guymon, her next friend, appellant, before a justice of the peace in Livingston county, against Edmond Franey and John Franey, appellees, to recover damages to a Ford car which was owned and driven by the appellant.

A trial was had before the justice of the peace without the intervention of a jury, and the court found for the appellant. Appellees appealed to the Circuit Court of Livingston county where a trial de novo was had before a jury. At the close of the plaintiff's testimony instructions were offered on the part of each of the defendants, for a directed verdict in their behalf, and the court reserved its ruling until the close of the evidence. At the close of all of the evidence the court refused the peremptory instructions offered by the defendants. The case was argued and submitted to the jury and after the jury had been out overnight, considering of their verdict, the court on its own motion recalled them and directed a verdict for the defendants. The appellant made a motion for a new trial which was denied and this appeal followed.

This case was tried upon the theory that appellee John Franey was driving a motor vehicle upon a public highway in Livingston county at a greater rate of speed than is reasonable and proper having regard for the traffic and use of the way, and in such a manner as to injure the automobile of the appellant.

It appears that on October 26th, 1923, about 4:30 o'clock in the afternoon Irene Guymon in company with three other persons

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These figures, by the way, are not to be taken literally, but only as a rough guide.

THEY ARE NOT TO BE TAKEN LITERALLY

This was a very large number of cases, and it was not possible to examine them all. The results of the examination of the cases are given in the following table. The figures are not to be taken literally, but only as a rough guide.

A table was also prepared showing the results of the examination of the cases. The figures are not to be taken literally, but only as a rough guide.

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was returning from Pontiac, Illinois, in the car of appellant on what is known as the Saunemin road. They reached Spafford bridge which is about two miles east of the Village of Saunemin and were traveling west. The bridge is about 16 feet in width and 50 feet in length and at about the center, planks are laid down lengthwise for cars to run on. The road narrows as it approaches the west end of the bridge and is slightly elevated. Appellant reached the bridge with her car and had driven across from the east to within a few feet of the west end at a speed of about 8 or 10 miles per hour when appellee, John Franey, who was driving his father's car reached the west end of the bridge. It is the contention of the appellant that John Franey did not stop or lessen the speed of his car before he drove onto the bridge so as to give appellant a chance to cross in safety; that appellant drove to the north and right when appellee John Franey, failed to stop the car he was driving, before appellant could drive off of the bridge; that he was driving at the rate of 25 miles an hour and gave no signal or warning that he was going to cross the bridge before appellant could cross and drive into the road; that he drove onto the bridge at an angle, headed towards the northeast and towards the car of appellant. The testimony further discloses that appellee John Franey stated after the collision, to Nora Gibb, an occupant of the car driven by appellant, that he did not see the bridge until he was almost up to it and dodged the bridge and struck appellant's car; that when the car driven by John Franey ran into the car driven by appellant it was with such force that the impact forced the car backwards to the east and greatly damaged it.

The testimony shows that appellee Edmond Franey was the owner of the car; that John Franey lived with his parents and on the day in question drove from his home to Pontiac accompanied by his mother, Mrs. Catherine Franey. John Franey went to Pontiac for the purpose of bringing his sister Helen home. He left Pontiac, according to

was returned from the office, Illinois, in the early morning of
that is known as the "Lumber Road". The road was a narrow
which is about two miles east of the village of Lumber Road
traveling west. The bridge at that point is about 100 feet
in length and is about 10 feet wide. It is a simple beam
for cars to run on. The road is in a straight line and
one of the ends is slightly elevated. The bridge is about 10
bridge the car and driver were about 100 feet from the
few feet of the road and at a speed of about 8 or 10 miles per hour
then appeared, John Trane, who was driving his car and was
the west end of the bridge. It is the contention of the appellant
that John Trane did not stop or lessen the speed of his car before
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could drive off of the bridge; that he was driving at the same
25 miles an hour and was on a level or driving west of the bridge
to cross the bridge before appellant could drive into
the road; that as he drove onto the bridge he was driving at
from the northeast and towards the car in a straight line
another distance that appellant John Trane, failed to stop the car
to move him, an occupant of the car, away from the car, that
did not see the bridge until he was almost up to it and he was
bridge and struck appellant's car; that when the car drove
John Trane ran into the car driven by appellant in the same
force that the impact forced the car backwards to the west and
greatly damaged it.

The testimony shows that appellee Thomas Trane was the driver
of the car; that John Trane lived with his family on the east
in question drove from his home to the north end of the bridge
Mrs. Catherine Trane. John Trane went to the north end of the bridge
of driving his sister Helen home. He left his car, according to

his contention, at about 5 o'clock in the afternoon. Leaving Pontiac he drove directly east to a point about two miles east of the village of Saunemin, a distance of about 15 miles from Pontiac, and as he was driving east he noticed a glaring light from an automobile approaching from the east and he put on his dimmers and continued to travel at a rate of speed from 20 to 25 miles an hour; that his windshield was covered with mist and falling rain and that he kept to the right side of the road; that he was unacquainted with the highway and it was not until shortly before he reached the bridge that he noticed there was one, and the result was the collision.

It is the contention of appellant that the court erred in directing a verdict. Appellees also insist that according to their view the decision of this cause must be determined upon whether or not it was error for the court to direct a verdict. On the motion to direct a verdict only that evidence can be considered which is in favor of the party against whom the motion is directed, and that evidence must be considered in the light most favorable to that party, together with all the legitimate inferences which may be drawn from it in his favor.

It is insisted by the appellees there is presented in this record two questions for consideration.

First, was there any evidence which tended to establish that the driven John Franey was guilty of negligence? and,

Second, taking the evidence and all the reasonable inferences to be drawn therefrom most favorable toward the conduct of the plaintiff, was she free of contributory negligence?

In view of the facts as disclosed by this record we are of the opinion that it was a question of fact for the jury to determine whether or not the appellant was guilty of contributory negligence and also as to whether or not John Franey, one of the appellees, was guilty of the negligence charged.

In *Mirich vs. The T. J. Forschner Construction Co.*, 312 Ill. 343, it is said, "In actions at law, when there is a conflict in the testimony, it is for the jury to weigh and determine the evidence admitted by the court as competent." It is also said, "The trial court has no power when a jury is not waived, to determine the weight and preponderance of conflicting evidence introduced to establish or disapprove facts or to take a case from the jury and direct a verdict where there is legitimate evidence tending to prove the cause of action, as such procedure is a direct violation of the constitutional right of trial by jury."

It is not the rule, as is suggested by appellees, that the court is authorized to direct a verdict if it is obvious that it would not permit a verdict to stand.

We are of the opinion that the court erred in directing a verdict and for that reason the judgment of the Circuit Court of Livingston county is reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 30th day of
June in the year of our Lord one thousand
nine hundred and twenty six.

Justus L. Johnson
Clerk of the Appellate Court



abstract only

AT A TERM OF THE APPELLATE COURT,

242 I.A. 649

Begun and held at Ottawa, on Tuesday, the sixth day of

April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: On

JUL 13 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

see book 1/2

Mary Azella Scanlon,
appellee,

vs.

Kate Samuels,
appellant,

Appeal from the Circuit Court
of Peoria County.

242 I.A. 649

Jett, J.

This suit was brought by Mary Azella Scanlon, Appellee, against Kate Samuels, Appellant to recover damages for an injury she received from a fall in descending certain concrete steps from the porch of the premises of the appellant to a side-walk.

The declaration consists of three counts, and in substance charges that on and prior to the 23rd day of February, 1924, the defendant was the owner of an apartment building, known as 206 Third Street in Peoria; that there were two apartments in said building, one above the other; there was a two-story porch on the north side of the apartments and concrete steps leading from the first floor of the porch to the side-walk, and these steps were for the common use of the tenants in both apartments; that the plaintiff was a tenant of the defendant, and living in the upper apartment, and other tenants of the defendant lived in the lower apartment; there was a gutter extending along the outer edge of the porch roof and on the date in said declaration mentioned, and for a long time prior thereto, this gutter was, and had been out of repair, and leaked water on the front steps, which, when the weather was cold, froze and made the steps slippery; that the defendant was negligent in allowing the gutter to be in a leaky condition; that the defendant knew of its condition, long before the injury to the plaintiff, and that she had promised to fix it.

It is further averred that said steps having ice upon

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them, on the date aforesaid, from water that had dripped from said leaky gutter, the plaintiff, with all due care and caution for her own safety, was attempting to descend them when she slipped upon said steps, and fell and injured her spine, arm, legs and back; that she was permanently injured and suffered great pain, and will so suffer in the future; that she has been prevented from attending to her affairs, and will be so prevented in the future; that she has laid out and expended large sums of money and will be required to lay out other large sums, for medical and surgical services, hospital and nurse hire, ~~xxx~~ ~~i~~ in endeavoring to be cured of said injuries to the damage of the plaintiff, etc. The defendant pleaded the general issue. A jury trial was had, and the finding was in favor of appellee for Five Hundred Dollars. Judgment was rendered on the verdict and appellant prosecuted this appeal. For convenience Appellee will be called plaintiff and appellant defendant. The reasons for a reversal of the judgment are that the proof does not show that the plaintiff slipped on the steps or that she was in the exercise of due care; that the evidence fails to show that the steps were rendered slippery by water leaking from the gutter from the eave of the roof, as declared in the declaration; that she did not prove her case by direct evidence and that the tenth instruction, given on the part of plaintiff, is erroneous. All of the reasons assigned for a reversal, except the one relative to instruction number ten, are questions of fact for the jury. The record discloses that the plaintiff, among other things testified that on the 23rd day of February, 1924, she was living in defendant's apartment at 206 Third Street, Peoria, Illinois; that she came home from the office between three and four o'clock in the afternoon; started down town again about four o'clock, with Mrs. Van Sickles; ***** there are six concrete steps beside the step on to the walk; the roof of the porch hangs a little bit over the first step; there is spouting or guttering and you could see the holes in the spouting; the gutter is about six inches back from the edge of the porch;

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never been on top of the roof but I can look up and see the water coming down through the hole; the ice on the steps was mound shaped; the water would go from one step to the other and form the ice; Mr. Norris had put some non-skid stuff on the steps a few days before; on this day other people in the house had put it on; they put sawdust on about one o'clock. When I came out this time, more ice was froze on top of it and you couldn't see it. When it would rain you could see the water come down from the holes in the roof at the edge of the porch. When it would warm up it would drip through. When I came out at four o'clock, ice had formed again on the steps; when I went in at one o'clock it was dripping; observed the leak on the day in question.***** I came out and the first thing my feet went out from under me and I lit on the end of the step on the end of my spine. I rolled on the step. Mr. and Mrs. Norris who roomed with me, picked me up and carried me upstairs and laid me on the bed. The evidence tends to prove the allegation of the declaration, that the plaintiff slipped upon the ice, which was formed from water falling from the eaves of the porch. The testimony also tends to show that the plaintiff was in the exercise of due care and caution. The degree of care exercised by the plaintiff may be determined by circumstantial evidence, or as has, at other times been stated, may be inferred by the jury from circumstances appearing in proof.

North Chicago Street R.R. Co. vs Rodert

203 Ill. 413-415,

I. C. R. R. Co. vs Cragin

71 Ill. 177

C. & E. I. R. R. Co. vs Beaver

199 Ill. 34

Unless we can say the finding is manifestly against the weight of the evidence, we would not be justified in reversing the judgment. Unless the court can say there is no evidence upon which the jury, 'in the eye of the law', can reasonably find for

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the plaintiff, the issue must be determined by a jury; Linnerty vs Dorway, 175 Ill. 508-13-14. In view of what is disclosed, by the record, we cannot reverse the judgment because of the facts.

The defendant complains of the tenth instruction, given on the part of the plaintiff. This instruction relates to the measure of damages. The last part of the instruction is ~~xxx~~ as follows: "And may find for her such sum, as in the judgment of the jury, under all the evidence, and the instructions of the court, in this case, will be a fair compensation for such injuries, pain and suffering, loss of time, and inability to work, if they are proven to be the direct and proximate result of the alleged negligence of the defendant; and the negligence alleged has been proven by the preponderance of the evidence." It is the contention of the defendant that the last sentence in the instruction must have led the jury to believe that the court was telling them that the alleged negligence had been proven by a preponderance of the evidence. It is insisted by the plaintiff, that where the semicolon appears, in the original instruction, there was a comma. The original instruction is not before us. The record does disclose however, that a number of instructions given by the defendant, required the jury to be satisfied by the greater weight of the evidence, of the defendant's negligence before they could find against her, and in view of that fact the jury certainly could not have reached the conclusion that, in this particular instruction, the court was giving them a peremptory instruction, on the question of negligence. To so hold would be an attack upon the intelligence of the jury. We are of the opinion that the defendant was not prejudiced by instruction number 10.

In conclusion, we are of the opinion that no reversible error was committed, and the judgment of the circuit court of Peoria County will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 13th day of July in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court

54 24 a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

242 I.A. 649

BE IT REMEMBERED, that afterwards, to-wit: On
JUL 24 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

April Term, 1926.

John Ernest Harwood,
Appellee,

vs.

Chicago & Eastern Illinois
Railway Company, a Corporation,
Appellant.

Appeal from the Circuit
Court of Iroquois County.

242 I.A. 649

Partlow, P. J.

Appellee, John Ernest Harwood, obtained a judgment for \$3750 in the circuit court of Iroquois county for damages to his person and property by reason of the collision of a truck in which he was riding with a train of appellant, and an appeal has been prosecuted to this court.

Appellant insists that appellee was not in the exercise of due care and caution for his own safety at the time of the accident. The declaration consisted of six counts. The first charged general negligence. The second that the train was operated at a high and dangerous rate of speed. The third that the train was operated without giving any warning of its approach. The fourth that no bell or whistle was sounded as required by statute. The fifth that there was a speed ordinance in the village limiting the speed of the train to ten miles per hour which ordinance was violated; and an additional count charged that certain buildings obstructed the view, and that the train was wilfully and wantonly operated in complete disregard of the safety of the lives and limbs of persons using the public highway.

The accident occurred in the village of Papineau, in Iroquois county. The tracks of appellant, three in number, extend north and south through the village and cross Papineau street, which is an east and west street. The west track is the south bound track, the middle track is the north bound track, and east of it nine feet and eight inches is a switch track extending to the south of the

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intersection. The crossing is practically level. There is an electric signal bell on the crossing operated automatically. A sign with the words "Railroad Crossing" is west of the south bound track. South of the intersection 101 feet, and east of the north bound track about 48 feet, is a dismantled box car which is the first obstruction to the view towards the south. East of this car was a lumber yard. There was an elevator east of the right of way, 548 feet south of the crossing; and the depot was 1392 feet south of the crossing. Main street was about 140 feet east of the right of way and parallel with it, and connected with Papineau street just east of the crossing.

On May 12, 1924, about 8:37 A. M. appellee was driving a truck north on Main street loaded with 1500 dozen eggs. He turned west at Papineau street and approached this crossing. A passenger train traveling 55 to 60 miles per hour was approaching the crossing from the south on the north bound track. Appellee testified he was traveling six to eight miles per hour as he approached the crossing; that he looked in both directions; that he drove up to within thirty feet of the crossing, threw his car into neutral and stopped; that he again looked in both directions, saw no train, heard no signal of any kind, put his car into low gear, and started across the tracks; that when he was three feet from the track he looked south and saw the train 100 to 150 feet away and then heard the whistle for the first time; that he could not stop, he tried to get across, and was hit by the train. The truck and its contents were practically destroyed and appellee was injured.

Appellee testified he stopped thirty feet east of the track. He is not corroborated by any witness in this regard but he is contradicted by several witnesses who testified that he went straight across the tracks without stopping. He testified there was a box car on the side track south of the crossing which obstructed his view. He is not corroborated in this statement by any other witness but is contradicted by several. Thirteen witnesses testified that the train whistled as it was approaching the crossing. Some

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testified they first heard the whistle when the train was at the depot. There is evidence tending to show that the whistle was not only sounded at the crossing south of the one in question, but that it was sounded several times between that point and the point of the accident. Only two witnesses testified they heard no whistle. Five witnesses testified that the electric bell on the crossing was rung as the train approached the crossing. Two witnesses testified they did not hear it. Three witnesses testified the bell on the engine was ringing as the crossing was approached. One witness testified the engine bell was not ringing. Six witnesses testified they had made observations at the crossing and that standing at a point thirty feet east of the north bound track, in Papineau street, there was an unobstructed view south along the right of way for a distance from three-fourths of a mile to a mile, and some witnesses testified to distances even greater.

The evidence was not sufficient to sustain the wilfull and wanton count of the declaration. Under all of the other counts, it was necessary for appellee to prove that he was in the exercise of due care and caution for his own safety just prior to and at the time of the accident. If he did not prove he was in the exercise of due care and caution he cannot recover under any of these counts. One who approaches a railroad crossing without seeing an approaching train when the surroundings are such that he would have seen it had he looked, or seeing the train attempts to cross in front of it, in either event, fails to exercise reasonable care in approaching and going on the crossing. *Stein vs. Chicago & Eastern Illinois Railroad Company*, 199 Ill. App. 48; *Koneig vs. Semaru*, 197 Ill. App. 624; *Chicago, Peoria & St. Louis Ry. Co. vs. DeFreitas*, 109 Ill. App. 104.

Several witnesses testified they heard the roar of the train and that the noise attracted their attention. With all the evidence in the case with reference to the bell sounding on the crossing, the engine bell ringing, the whistle blowing, and the

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unobstructed view which appellee would have had provided he looked south within a reasonable distance of the crossing, it difficult to understand how he can successfully claim that he was in the exercise of due care.~~xx~~ The slow rate of speed at which he testified he was going would have enabled him to have stopped if he had been in the exercise of due care and caution for his own safety. We have read this evidence with considerable care and have arrived at the conclusion that the manifest weight of the evidence is that appellee was not in the exercise of due care and caution for his own safety. His case depends to a large extent upon his own evidence alone, and he is contradicted in almost every material respect by many witnesses, several of whom are entirely disinterested, and are in no way connected with appellant. If he was not in the exercise of due care and caution for his own safety then it is immaterial that appellant may have been guilty of the negligence charged in the declaration.

There is another reason why the judgment will have to be reversed. Each count of the declaration charges not only damages to the truck and its contents but also personal injury to appellee. Evidence was introduced as to the value of the eggs and the amount of the damage to the truck. Appellee testified that the truck and its contents were owned, one-half by appellee and one-half by a man by the name of Richardson. He was therefore not entitled to recover the whole damage to the truck and contents.

It will not be necessary to consider any other errors urged and the judgment will be reversed and the case remanded.

Reversed and Remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 24th day of
July in the year of our Lord one thousand
nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court

5430a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

242 I.A. 650

BE IT REMEMBERED, that afterwards, to-wit: On
JUL 24 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

APRIL TERM, A. D. 1925.

Ottawa Banking & Trust Company
of Ottawa, Illinois,

Appellee,

vs.

Anna N. Kendall,

Appellant.

Appeal from the
Circuit Court of
Bureau County.

242 I.A. 650

Jett, J.

This cause was before this court on a former occasion and an opinion was filed therein on January 24th, 1923, and reported in 227 Ill. App. 531, in which a full statement of the facts were given and for that reason it will be unnecessary to restate the facts. When the case was previously before us the judgment was reversed and the cause remanded. After our decision it was re-docketed in the Circuit Court and set for trial on November 19th, 1924. The appellant not appearing at that time judgment was entered in favor of appellee. Three days later appellant appeared and entered a motion to vacate and set aside the judgment and for a new trial and for leave to introduce evidence. On January 10th, 1925, the motion to vacate and set aside the judgment and for a new trial and for leave to introduce evidence was granted by an agreement of the parties, and it was ordered that the judgment be opened up but to stand as security and that the execution which had been issued upon said judgment be stayed pending the further order of the court. A few days later appellant again appeared by her attorneys and asked leave to file three additional pleas. These were pleas in abatement. The court denied the leave to file the three additional pleas and error is assigned by appellant upon this ruling. No error was committed in the ruling of the court in denying leave to file the pleas in abatement. These pleas were predicated upon a defective service of

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notice of the re-instatement of the cause after it had been to the Appellate Court. There is no doubt about the insufficiency of the service of that notice but appellant waived the objection by general appearance for the purpose of moving to set aside the judgment by default and for leave to introduce evidence upon a new trial. She could have limited her appearance for the purpose of challenging the sufficiency of the notice and the jurisdiction of the court, but she did not do so, and entered a general appearance. Appellant therefore waived the question of jurisdiction as to the person. The court had jurisdiction of the subject matter.

When the case was reached for trial and after the jury had been selected, empannelled and sworn the defendant asked leave to file seven additional pleas. This motion was also denied and error has been assigned as to the ruling of the court. Whether the court should have granted leave to file the seven additional pleas to the merits or not is a question within the sound discretion of the trial judge and will not be disturbed unless that discretion has been abused. In view of the fact that the case had been once tried and again set for trial and the defendant waited until after the jury had been sworn before asking leave to file the seven additional pleas, it cannot be said there was any abuse of judicial discretion in denying the leave. Furthermore the record discloses that when leave was asked to file the seven additional pleas the court examined them before refusing the request.

The record further shows that there were ~~on~~ file six pleas and it is fair to assume that the court was familiar with them at the time he examined the seven additional pleas offered by appellant. The same defense could have been made under the pleas then on file that would have been admissible under the seven additional pleas sought to be filed. Moreover, appellant in her argument has not suggested in what manner she was injured by the refusal of the court to permit her to file the seven additional pleas.

On the second trial of the cause it was heard upon substantially the same evidence that was before us heretofore. In former opinion we held that by giving the note sued on in this case she had waived the defects which she claimed existed in the original notes. In our opinion at page 537 we said:

"We are not unmindful of the fact that one of these notes was purchased after maturity. Relative to the note on which this judgment was based, the appellee up to the time that judgment was entered did not claim she had any defense to the note nor that she was entitled to a credit of \$4,500 or any other sum. But she made payments from time to time on the notes given December 12, 1911, and executed renewal notes time and again, and of which number the one now declared upon is one. It will be remembered that the two \$7,500 notes executed by appellee were made payable to Stout and by him indorsed and delivered to the bank. By such act, the bank not only owned the notes with the security of the maker, but in addition thereto the security of the indorser. Afterwards the appellee delivered to the bank the 600 shares of stock in the insurance company purchased by her as collateral security for the purchase of the notes. When she admitted her legal liability on the two \$7,500 notes and executed and delivered to the bank her three notes for \$5,000 each, and her fourth note for the accrued interest in the sum of \$975, the bank surrendered to her the two \$7,500 notes with the indorsement of Stout thereon, and also the 600 shares of stock in the insurance company. By so doing the bank surrendered the security not only of the indorsement of Stout, but also the security of the stock. This was a valuable consideration for the notes then given and the extension of time for the payment of the debt evidenced thereby. If appellee, with full knowledge of all the facts of and concerning the transaction in which she participated in the purchase of the stock and relative to the defense she now interposes, recognized her legal liability and gave new notes for the debt with such full knowledge and the appellant surrendered its security, as we have already seen that it did, we are unable to see or understand how it can be successfully claimed that she is not barred from making the defense that the note declared upon was secured by fraudulent representations. A subsequent promise with full knowledge of the facts is certainly equivalent to an original promise made under similar circumstances, and no one acting with full knowledge can justly say that he has been deceived by false representations."

Again, on page 540, we said:

"for the reasons already assigned we hold that the facts in this case are such that appellee ought now to be estopped from insisting on her alleged defense to the original notes. We hold that the appellee under the facts in this case cannot insist upon the defense that the original notes were obtained by fraudulent representations."

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Other questions have been suggested and argued and we have examined them and we are of the opinion that no substantial error was committed in the case and the judgment of the Circuit Court of Bureau County will be affirmed, which is accordingly done.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 24th day of July in the year of our Lord one thousand nine hundred and twenty-~~six~~ six.

Justus L. Johnson
Clerk of the Appellate Court

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

242 I.A. 650

✓ BE IT REMEMBERED, that afterwards, to-wit: On

JUL 28 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



The People of the State
of Illinois,

Deft. in error,

vs.

Benjamin J. Barrett and

Julius V. Balz,

Pltfs. in error,

Error to the Circuit Court
of Lake County.

242 I.A. 650

Jett, J.

An indictment was returned by the grand jury of Lake County at the October Term of the Circuit Court, in the year 1925, charging Benjamin J. Barrett, Julius V. Balz, G. T. Moore, and J. B. Roberts with the offense of conspiracy, to obtain money by false pretenses and by the confidence game. Moore and Roberts were not apprehended. Plaintiffs in error Barrett and Balz were tried jointly, which resulted in their conviction. Motions in arrest of judgment and for a new trial were denied and judgment rendered on the verdict of the jury. Barrett was sentenced to serve one hundred and thirty five days in the County Jail of Lake County and to pay a fine of \$2,000. Plaintiff in error Balz, was fined the sum of \$500. Plaintiffs in error each prosecute this writ of error.

The evidence shows that in March, 1925, plaintiff in error Barrett, together with Moore and Roberts went to the City of Waukegan in Lake county, Illinois, ostensibly for the purpose of raising a fund, the proceeds of which were to be devoted to a so-called "police pension fund" and publish a history of the police department. The three men, Barrett, Moore and Roberts solicited throughout the City of Waukegan and collected from various merchants, contractors and business men of said city, certain sums of money, ranging from \$10.00 to \$600. They continued to solicit and collect money for a period of about three

The People of the State
of Illinois,

County of Cook,

vs.

Benjamin L. Schwartz,

Julius V. Katz,

Defendants.

Left, 1.

The indictment was returned by the grand jury of Cook County

at the request of the State's Attorney, in the year 1933, against

the Benjamin L. Schwartz, Julius V. Katz, and the

Roberts with the offense of conspiracy, the charges were as follows:

Verdicts and the confessions were made. Verdicts and confessions were made

apprehended. The indictment was returned by the grand jury of Cook County

jointly, which resulted in a joint confession. The charges were as follows:

of judgment and for a net profit of \$10,000. The charges were as follows:

on the verdict of the jury. The charges were as follows:

hundred and thirty-five in the County of Cook, Illinois, and

and to pay a fine of \$5,000. The charges were as follows:

the sum of \$500. The charges were as follows:

of error.

The evidence above was taken from the trial, and the

Taxatt, together with the State's Attorney, in the year 1933, against

Wesley in Lake County, Illinois, the charges were as follows:

of raising a fund, the proceeds of which were to be devoted to

a so-called "Police Pension Fund" and which was a violation of the

Police Department. The charges were as follows:

solicited throughout the City of Chicago and collected from

various merchants, contractors and business men of Cook County,

certain sums of money, ranging from \$10.00 to \$500.00, and the

sums to solicit and collect money for a period of about three

weeks. They presented to the person or persons solicited, a letter written on the stationery of the Police Department of the City of Waukegan and signed by plaintiff in error Balz, Chief of Police, which letter introduced Barrett and advised that he "has been assigned to call on you in the interest of the local police department and ask your cooperation in assisting them in raising money for their pension fund. Anything you do in behalf of this cause will be highly appreciated by the entire police department.

(Signed) Julius V. Balz,
Chief of Police.

For further reference phone 123, Police Department."

Barrett, Moore and Roberts were strangers in the City of Waukegan and were not in any way connected with the city or any of its various departments. It appears from the evidence that the solicitations took on the forms of intentional brow-beating and graft. Threats were made to different persons who were solicited to subscribe, with reference to the interference of their business and to police protection. After \$6950.00 had been subscribed a large proportion of which had been paid, the city council ordered the solicitors to stop taking further subscriptions. Armed with the letter from the police department, signed by plaintiff in error Balz, the said Barrett, Moore and Roberts, in soliciting funds from the persons called upon made various misrepresentations. In some instances they represented they were employed by the police department of the city of Waukegan, being either night police or motorcycle policemen. On other occasions they represented that they were connected with a local newspaper. On some occasions threats were made that proper police protection would not be afforded those who did not meet the demand of the solicitors or that the same favors would not be shown to those who refused to comply with their request, as were given to those who did comply. In other instances they represented that the police department had fixed the amount that was to be given by the particular person solicited;

that the solicitors were friends of the Chief of Police Balz; that they had full authority from the police department to make the collections. In almost every instance the amount subscribed was made in the form of a check payable to plaintiff in error Balz. An account was opened in the People's State Bank of Waukegan by plaintiffs in error and they made three visits to the bank together. On the first two occasions Barrett and Balz visited the bank the checks obtained from the various subscribers were handed to the Vice-President thereof and he was requested to compute 15% of the total amount collected, credit the account previously referred to with the amount representing 15% of the total collections and give Barrett in the presence of Balz the remainder; that is, 85% in currency. This was done at the direction of plaintiffs in error Barrett and Balz. On the third visit both plaintiffs in error appeared, presented checks indorsed by Balz, approximating \$1800. On this occasion no deposit was made; that is, no deduction of \$15% appears to have been made or deposited, but the entire amount was cashed and the currency was given to Barrett in the presence of Balz. In other words, Balz went to the bank with Barrett and on the first two visits they deposited 15% of the amount which Barrett and his men had collected. The balance was then paid by the cashier of the bank to plaintiffs in error in currency. On the third occasion the sum of approximately \$1800 was exhibited in the form of checks payable in the same manner and indorsed by Balz. No portion of it was deposited in any fund or account, but the checks were all cashed and plaintiffs in error took away from the bank \$1800.

The evidence further shows that Barrett was informed by Albert L. Hall, corporation counsel, that the City Council of Waukegan disapproved of the method used to solicit funds and that they had adopted a resolution to that effect, and that at a conference between Hall, Barrett and Balz, Barrett agreed to stop taking subscriptions and making collections. Barrett was directed

to make restitution of the sums collected which he agreed to do. He was also informed not to print any book relative to the police force. This information was given and a promise made to make restitution about the 15th of April, 1925. Early in September, 1925, Barrett had failed to carry out the agreement of making restitution of the sums collected, at which time he was located and arrested. In conversation with Hall, corporation counsel, Barrett stated that he had not turned any of the funds in question over to Balz. Balz states that he did receive \$640. in cash and \$180 in checks, to cover printing expenses. No printing had been done, however, prior to the time of the return of the indictment.

The evidence also discloses that the solicitors Barrett, Moore and Roberts, as they carried on the campaign collecting about \$6950.00 appeared to be entirely conversant with the financial condition of the merchants and business men of Waukegan and in a number of instances were very familiar with the peculiar interest that certain individuals had in politics, or in the use of the streets, the extent of their business and in some particulars, the favors desired by them from the police department.

It is very apparent from what is disclosed in this record that this information came from Balz. Balz, according to his own testimony, originated the plan, signed a contract with Barrett, dictated a letter in triplicate for the solicitors, and was, on a number of occasions, called by prospective contributors in relation to the solicitations being made by the respective solicitors.

The public was not in any manner informed as to the nature of the campaign to be carried on, to collect the so-called "Police Pension Fund" by either Balz, Barrett or any of his representatives, except such information as was given out by the solicitors. It necessarily followed that when the contributors parted with their property and money, they did so entirely and solely on the strength of the representations that were made by Barrett or his solicitors,

or the confidence reposed in him, or them, and in some instances, after talking to plaintiff in error Balz, over the phone and from the letter given by Balz as Chief of Police to Barrett and his solicitors. The record is absolutely silent as to any other information which the prospective contributors might have received with reference to the plan that was conceived by plaintiffs in error.

A number of reasons are argued for a reversal of the judgments entered against plaintiffs in error. It is urged by plaintiffs in error that the court improperly refused to quash the indictment on motion of Balz on the ground that he was a witness before the grand jury. The motion to quash is not supported by affidavit as to what occurred in the grand jury room, nor is there anything stated in the motion to indicate what testimony was given by the plaintiff in error Balz before the grand jury. The record does disclose, however, for the purposes of the motion to quash the following facts:

- (1) That plaintiff in error Balz was subpoenaed as a witness before the grand jury;
- (2) That he was fully informed by the state's attorney of the nature of the investigation then being made by the grand jury;
- (3) That there was no charge pending against Balz and that he was not under arrest;
- (4) That he was fully advised as to his legal and constitutional rights and warned that his statements might at a later time be used against him;
- (5) That he waived his right not to give evidence before the grand jury and voluntarily testified.

One accused of crime is entitled to all of the rights and privileges conferred upon him by law and by the constitution of the State. He can waive such constitutional rights if he sees fit so to do. Furthermore the only reason relied upon for the quashing of the indictment is the mere fact that plaintiff in error Balz, testified before the grand jury that subsequently indicted him.

It is not necessary to cite any authority in view of the facts as disclosed by the record to support the ruling of the court in denying the motion to quash. We are of the opinion therefore, the court did not err in overruling the motion of plaintiffs in error to quash the indictment.

It is also urged that the court committed error in denying a separate trial to Barrett. The following is all that appears to have taken place as is shown by the abstract relative to the motion for a separate trial. Mr. Welch, attorney for Barrett, said: "I desire to make a motion for a severance on the ground that Mr. Balz has testified before the grand jury in behalf of the defendant Barrett." The above is all that took place before the court bearing upon the question of a separate trial. It will be noted that no reason or reasons are assigned for the request to try the plaintiffs in error separately except that Balz had testified before the grand jury in behalf of plaintiff in error Barrett. The rule is that a motion for a separate trial must be made in writing showing the reasons for granting the same and must be supported by affidavit. *People v. Paisley*, 299 Ill. 576; *People v. Wood*, 306 Ill. 224.

In *People v. Paisley*, supra, at page 580, the court said: "Furthermore, such a motion must set out grounds showing reasons for granting a separate trial and the motion must be supported by affidavit. *People v. Gukouski*, 250 Ill. 231; *People v. Temple*, 295 Ill. 463. The motion in this case not only fails to allege sufficient grounds, but it is not supported by affidavit and it is therefore insufficient." It necessarily follows that the court did not commit error in denying the motion for a separate trial.

The next contention of plaintiffs in error is that the court erred in giving instruction number 2, on behalf of the People. The instruction complained of is in reality a series of instructions embodying the law on conspiracy. The instruction in question embodies a statement of the law that has been frequently approved

by the court of last resort in this State. The part of the instruction to which objection is made deals with the obstruction of the administration of public justice. The indictment does not charge plaintiffs in error with a conspiracy to obstruct the administration of public justice nor was there any evidence offered in support of such a charge. We are of the opinion that this portion of the instruction was inapplicable although it did state the law correctly. It is inconceivable, however, how the instruction could operate to the detriment of either of the plaintiffs in error. It will be remembered that the plaintiffs in error are charged in the indictment with conspiring to obtain money by false pretenses and by the confidence game. The jury in their verdict found each of them guilty of conspiracy in manner and form as charged in the indictment. It is very apparent that the mere fact that there was an element included in the instructions defining the law of which the plaintiffs in error were not charged could not have worked any harm to them or either of them. The rule in this State is that a court of review will not reverse a conviction in a criminal cause for a mere trivial objection which does not in any manner affect the merits of the case and does not appear to have done any harm. *Moore v. People*, 190 Ill. 331-338.

In *Needham v. People*, 98 Ill. 275, an instruction was given which was entirely inapplicable and the court held it was harmless.

The case which best illustrates the harmlessness of the instruction complained of is *People v. Poindexter*, 243 Ill. 68. This was an indictment for conspiracy and the particular offense was a conspiracy to obtain money by the use and means of a confidence game. A charge very similar to the one in the case at bar. The second count of the indictment, however, did not charge the offense of conspiracy to obtain money by means and use of the confidence game but charged a conspiracy to do an illegal act ^{injurious} ~~injurious~~ to public trade. Plaintiff in error contended that the court should

have instructed the jury to find the defendant not guilty on said second count of the indictment. The court refused to do so and in the decision of the case among other things at page 72 said: "Section 46 is directed against conspiracies of different kinds. One kind is a conspiracy to commit a felony of any kind, and such conspiracy is punishable in any event. Another kind is a conspiracy to do an illegal act injurious to the public health, morals, police, or the administration of public justice. * * * *" "The indictment here charges a conspiracy to commit a felony, viz, to obtain money by means and use of the confidence game. It is charged that the conspiracy was entered into with intent to commit an illegal act injurious to public trade, but such allegation may be rejected as surplusage. The intent is no part of the description of the offense. A conspiracy to commit a felony is a violation of the statute regardless of the intent. The only thing which it was charged that the conspirators proposed to do was to commit a felony by obtaining money by means of the confidence game. The charge of a conspiracy for that purpose was complete, and no charge as to the intent of the conspirators could make it better or worse in law." We are of the opinion that plaintiffs in error were in no way prejudiced by the giving of instruction number 2.

It is next insisted that the court erred in refusing to give on the part of the plaintiffs in error the following instruction: "The court instructs the jury that with respect to all verbal admissions, it may be observed that they ought to be received with great caution. The evidence, consisting as it does, in the mere repetition of oral statements, is subject to much imperfection and mistake; the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the

altering witness by unintentionally ~~stating~~ a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say." An instruction that is merely argumentative is properly refused. People v. Calseg, 311 Ill. 365. A reading of this instruction establishes the fact that it is an argument against the value of testimony consisting of verbal admissions and it further argues the manner in which the same should be received by the jury. The court did not commit error in refusing the instruction.

Complaint is also made of refused instruction number 4 offered by plaintiffs in error. This instruction was offered with a view evidently of informing the jury that they should not convict from any feeling of prejudice. This instruction could have been given and it would not have been error in so doing. Plaintiffs in error, however, were not prejudiced by the refusal of the instruction because they received the benefit of the same in instructions numbered 1, 3, 6 and 14 given in their behalf.

Complaint is made of other instructions which were refused by the court. We have examined them, and, we are not prepared to say that reversible error was committed by their refusal for the reason that the record discloses that there were given on the part of the plaintiffs in error twenty-one instructions defining the law of the case. The jury was fully instructed on all questions in the case and their rights were not prejudiced in any manner by the refusal to give the instructions of which complaint is made.

Complaint is made that the court improperly addressed remarks to plaintiff in error Barrett, while he was on the witness stand. It would appear from what the record discloses that Barrett was evasive in his answers to the questions that were put to him by the state's attorney. It has frequently been held that the court presiding over a trial has the power to compel decorum in his court room that will insure respect for the proceedings and the exercise of such power, rather than mere advice and suggestion, is a duty

with which the trial court is charged. People v. Arnold, 248 Ill. 169-177; People v. Saylor, 319 Ill. 205. There was, in our judgment, no language used by the court that would in any way prejudice the rights of Barrett.

It is suggested by plaintiffs in error that they desire to raise the question as to whether or not the jury had a right to fix the punishment of the plaintiffs in error. No authorities are cited nor argument made in support of their suggestion. The jury was properly instructed as to the form of the verdict. Under the statute that is the basis for this prosecution, where the jury finds the accused guilty but does not find that the punishment should be confinement in the penitentiary, they may fix the penalty by way of jail sentence and fine. The most that can be said of the situation, if the action of the court in instructing the jury as has been pointed out, was wrong, is that the jury had no authority to fix the punishment. The court under this theory, therefore, had full power and authority to do so, and when it entered judgment fixing thereby the punishment, that portion of the verdict of the jury which specified the punishment became and is to be regarded as surplusage. Armstrong v. People, 37 Ill. 459; Henderson v. People, 165 Ill. 607; and a valid judgment of conviction based upon the finding of guilty by the jury was properly entered by the court. People v. Coleman, 251 Ill. 497; People v. Tanevich, 285 Ill. 376, at 381.

Plaintiffs in error also insist that no conspiracy was proved either by circumstances or by direct testimony. The point is not argued at any great length and no reasons are presented in support of the statement that the evidence does not support the verdict. We have heretofore stated what the evidence ^{shows.} It will be necessary to keep in mind the character of the charge presented against the plaintiffs in error, which is that of conspiring to obtain money by false pretenses and by means of the confidence game. It is not

necessary to actually prove the false pretenses where a conspiracy to commit such a crime is alleged, and it is sufficient if proved by direct and circumstantial evidence that such a conspiracy existed. *Ochs v. People*, 124 Ill. 399.

To constitute a crime of obtaining property by false pretenses there must be a false representation or statement of a past or existing fact (made by the accused or by some one instigated by him) with knowledge of its falsity, with intent to deceive and defraud, and which is adapted to deceive the person to whom it is made; a reliance on false representations or statements; an actual defrauding and obtaining of something of value by the accused or some one in his behalf. 25 Corpus Juris, 589. The rule is that, "although the pretense must be an inducing cause of the owner's parting with his property, it need not be the sole inducing cause; it is sufficient if it had a material influence in inducing the owner to part with his property although he was also influenced in part by other causes. 25 Corpus Juris 601; *Moore v. People*, 190 Ill. 331.

Without extending this opinion by further stating in detail what the evidence discloses, we think that the testimony fully sustains the charge as preferred against the plaintiffs in error. It will be observed that one count of the indictment charges plaintiffs in error with conspiring to obtain money by means of the confidence game. Much reliance is placed by the plaintiffs in error on the fact that there was a contract between Barrett and Balz. To our minds that is immaterial and of no consequence. The law is that if the transaction is, in fact, a swindle, it is immaterial that the form assumed is that of a lawful business transaction. *People v. Peers*, 307 Ill. 539-542. The fact that it assumed the form of a business transaction supported by contracts and other dealings which are ordinarily employed is no defense. The gist of the crime is the artifice used and the deception made to inspire an unmerited confidence, and no resort can be had to a document

because it assumes the form of a contract, as a defense to an unlawful scheme. People v. DePew, 237 Ill. 574-579; People v. Miller, 278 Ill. 500; People v. Poole, 310 Ill. 345.

It is claimed that the court erred in the exclusion of the book claimed to have been printed by plaintiff in error Barrett after the return of the indictment and his arrest. We have already shown that the question of the contract was of very little importance because it was entirely a question of the methods used and the representations made. The contract, however, was introduced in evidence, and the entire matter was presented to the jury so that they understood what the nature of the defense was; that is, that it was based upon the supposed contract entered into between plaintiffs in error. Furthermore, plaintiff in error Barrett was permitted to show what if any action he had taken with a view of publishing the book in question and was permitted to introduce a number of exhibits in the form of contracts with the respective contributors and copies of the advertising matter furnished by a number of them.

The evidence discloses that the city council of the City of Waukegan objected to the manner of the soliciting as made by the solicitors and that Barrett and the other solicitors were informed of the attitude of the said council; that he was notified to make restitution of the sums of money collected and that he agreed to do so and he was further notified that no book should be published as contemplated in the contract offered in evidence.

The evidence further shows that the soliciting was stopped in the month of April, 1925, at which time Barrett was ordered to make restitution; that he went away from Waukegan and the authorities had no notice of his whereabouts until in September following, and up to that time no book had been published and it seems to have been an after-thought on the part of the plaintiffs in error to

undertake to comply with the said contract after they were indicted. In view of what is disclosed by the record we do not think that any error was committed by the court in the exclusion of the evidence relative to the publication of the book testified about.

In conclusion, if the jury believed the testimony offered on the part of the People they were authorized to return a verdict of guilty. The verdict of a jury on questions of fact will not be disturbed unless palpably contrary to the weight of the evidence. *People v. Jarecki*, 291 Ill. 80; *People v. Horchler*, 231 id. 566.

Courts are reluctant to substitute their opinion for that of the jury upon controverted questions of fact. To justify this court in reversing on the ground that the evidence was insufficient it must believe that the finding of the jury is not sustained by the evidence or that it is palpably contrary to the decided weight of the evidence. *Steffy v. People*, 130 Ill. 98.

A court of review will not reverse a judgment of conviction in a criminal case unless satisfied there is a reasonable doubt of the defendants guilt. *Flanagan v. People*, 240 Ill. 170.

A judgment of conviction will not be reversed merely because the testimony is conflicting, but will only be reversed where the evidence is so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt of the defendants guilt. *People v. Martellare*, 281 Ill. 390. To the same effect is *People v. Thompson*, 321 Ill. 594-600.

Where the defendants testimony is an absolute denial of all testimony for the prosecution tending to connect him with the crime charged, it is for the jury to determine the credit to be given the testimony, and where the evidence for the prosecution establishes the guilt of the defendant beyond a reasonable doubt the court will not disturb a verdict finding him guilty. *People v. Considine*, 321 Ill. 590.

unfair to deny it. The fact that the defendant was not
advised. It is not to be inferred from the fact that the
this was not admitted by the defendant that the defendant
evidence relative to the guilt of the defendant was
In conclusion, it is the duty of the court to
the fact of the defendant's guilt. It is the duty of the
court. The burden of proof is on the defendant. It is
admitted that the defendant was not advised of the
People v. Tamm, 111 Ill. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The object of the review of judgments of trial courts is not to determine whether the record is free from error, but is to ascertain whether a just conclusion has been reached, founded upon competent and sufficient evidence, after a trial in which no error has occurred which might be prejudicial to the defendant's rights.

In view of the evidence and of the law, we are of the opinion that no reversible error was committed in the trial of this cause and the judgment of the Circuit Court of Lake county will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 28th day of July in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

242 I.A. 650

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 3 - 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

October Term, A.D. 1925.

Frank Ewanicki, minor by
Frank F. Follett, his guardian
and next friend,

appellant

Appeal from the Circuit Court
of La Salle County.

vs.

James C. Davis, Agent of the
President, under the Transporta-
tion Act of 1920,
appellee.

242 I.A. 650

Jett, J.

This is a suit instituted by Frank Ewanicki, an infant, by Frank F. Follett, his guardian and next friend, appellant, against New York Central Railroad Company, a Corporation, and Director General of railroads under the United States Railroad Administration Act, for personal injuries sustained by Frank Ewanicki. The injury complained of was occasioned on March 16th, 1918, and suit was commenced on February 27th, 1920, against the Director General of Railroads and the New York Central Railroad Company. The government took control of this railroad on December 28, 1917, and the control ceased on March 1st, 1920, as provided in the Transportation Act.

On March 20th, 1920, the general appearance, of the railroad company and the director general was entered in the case, by Boys, Osborne and Griggs, attorneys. Under the Federal Control Act, the director general of railroads required all suits for injuries arising after December 31st, 1917, to be brought against the Director General. A general order, known as 18-B issued May 22, 1919, by the director general provides that all suits must be brought in the county where the plaintiff resided at the time of the injury or in the county where the cause of action arose.

October 1937, 1938, 1939.

From 1937, 1938, 1939.

From 1937, 1938, 1939.

From 1937, 1938, 1939.

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The Transportation Act of February 28th, 1920, provided for the termination of government control and it was provided therein that suits against the director general pending at the termination of Federal control should not abate, but might be prosecuted to final judgment by substituting for the director general, the agent designated by the President under the authority conferred by the said Transportation Act.

March 5th, 1925, on motion of the Director General by Boys and Osborne, his attorneys, the suit was dismissed as to the New York Central Railroad Company, and the agent of the President, under the Transportation Act of 1920, was substituted as the sole party defendant. Subsequently, James C. Davis, filed a plea in abatement and recited that he appeared specially and alleged that he was not subject to the suit in La Salle County, in which this suit was instituted, because the injury complained of and as charged in the declaration arose on March 16, 1918, and during the period of time the government of the United States was in the possession and control of the railroad and property of the said New York Central Railroad Company. The plea then set out general order 18-B, providing for suits to be brought in the county where the cause of action arose or where the plaintiff resided, alleging that that order was in force and effect on February 27th, 1920, the day on which the suit was brought; that the cause of action did not arise, and that the plaintiff did not reside in La Salle county, but that the cause of action arose in Bureau County and therefore the Circuit Court of La Salle County had no jurisdiction over appellee. To this plea the appellant filed a general and special demurrer in which it set up, (1) that James C. Davis, agent of the President under the Transportation Act of 1920, mentioned in said plea is one and the same person as the Director General of Railroads under the United States Administration Act of which matter this court takes judicial notice; (2) as appears by the record in this case on March 5th, 1925,

the Director General of Railroads, entered his general appearance, thereby voluntarily submitting himself to the jurisdiction of the court and moved the court to substitute for said defendant, the director general of railroads, the agent designated by the President for such purpose under the provisions of the Transportation Act of 1920. (3) On said March 5th, 1925, the court granted said motion and by order of the court then entered, substituted said agent designated by the President for said Director General; wherefore plaintiff says the court then acquired jurisdiction of the said James C. Davis, agent of the President under the Transportation Act of 1920. (4) And the plaintiff further says that James C. Davis, Director General of railroads under the United States Railroad Administration, and his successor, James C. Davis, agent of the President under the Transportation Act of 1920, represent one and the same interest as a party defendant, namely, the government of the United States and that the voluntary submission by the director general of railroads under the United States Railroad Administration to the jurisdiction of this court heretofore set forth, without objection to the jurisdiction of this court is binding in law upon said James C. Davis, agent of the President, under the Transportation Act of 1920, as the successor of the Director General. Plaintiff then, for want of sufficient plea, prayed judgment, etc.

A hearing was had on the demurrer to the plea in abatement and the court overruled the demurrer. Plaintiff elected to abide by his demurrer and judgment was rendered against the plaintiff for costs of suit, and this appeal followed. The question involved is whether or not the Director General of railroads, the appellee, agent of the President under the Transportation Act of 1920, by entering their appearance and submitting themselves to the jurisdiction of the court conferred jurisdiction upon the court notwithstanding general order 18-B. The general rule is that when a party voluntarily submits himself to the jurisdiction of the court and

enters a general appearance that he cannot subsequently question the jurisdiction of the court but that such entry of appearance is valid and binding. It is said, however, by appellee that this rule does not apply in this proceeding because it is a suit against the United States. It is well understood that the United States has sovereign powers and cannot be sued unless the right to sue is specifically conferred by Congress; that when the power is so conferred it must be strictly construed and the right will not be exercised unless it is clearly within the provisions of the act conferring that power. When the United States Government took over the railroads, the act provided that the courts of the various states should have jurisdiction over causes of action arising by reason of the operation of the railroads and that the cause of action might be brought in the courts which ordinarily had jurisdiction of such causes. Power was conferred upon the President acting through the Director General to designate by order certain things. Among the things are those that are mentioned in the order of the Director General known as 18-B. In construing the effect of this order, it is the contention of the appellee that the immunity of the United States was herein waived only to the extent indicated by the Statute and orders of the Director General, and that the orders of the President promulgated through the Director General are valid and binding.

In reply to the suggestion that no suit can be maintained against the United States without the authority of the Congress, we are of the opinion that the Congress has given authority for the institution of suits by those injured in the operation of railroads under the Federal Control Act. It is not a question, as we view it whether or not the Congress has given the authority to institute this proceeding, but the question is, can it be maintained in a county other than where the injury was occasioned, contrary to the order 18-B.

It will be kept in mind the record discloses that the beneficiary plaintiff was injured on the 16th day of March, 1918. That on February 27th, 1920, this suit was instituted against the Director General and the New York Central Railroad Company; that on March 20th, 1920, a general appearance was entered in the case by the railroad company and the director general of railroads, by Boys, Osborne and Griggs, their attorneys; that on June the 3rd, 1920, a declaration was filed by the plaintiff setting up plaintiff's cause of action; that on March 13th, 1923, the case was called for the purpose of setting the same for trial and the court ordered the cause passed; that on February 9th, 1925, the parties appeared by their respective attorneys and the case was called for trial, the order of the court reciting that by agreement of the parties, it was ordered that the cause be continued; that on March 5th, 1925, a motion was made on behalf of the New York Central Railroad Company that the case be dismissed as to it; the motion was allowed and ordered entered to that effect, which left the Director General of railroads as the sole remaining defendant; that subsequently on the same day, however, March 5th, 1925, the Director General of railroads made a motion "to substitute for this defendant the agent designated by the President for such purpose under the provisions of the Transportation Act of the United States of 1920 as amended." The motion recites the history of the case and the motion to substitute was allowed, substituting for the Director General of railroads, the agent of the President as contemplated by the Transportation Act of 1920, as the sole defendant in the case and an order was entered accordingly. Afterwards on March 7th, 1925, the plaintiff moved to modify the proceeding order last above mentioned by inserting in the proper place, the name of the agent designated by the President, for such purpose under the provisions of the Transportation Act of the United States of 1920, as amended by the act in force March 3rd, 1923. On March 12th, 1925, a special appearance was entered, which among other things recited that Boys and Osborne entered the special

appearance of James C. Davis, agent of the President, under the Transportation Act of 1920, for the sole purpose of objecting to the jurisdiction of the court in said cause and for no other purpose.

This cause had been pending almost five years before the question of jurisdiction was raised and the party that raises the question had voluntarily entered his appearance by substituting himself as the sole defendant instead of the director general of railroads. The director general of railroads had entered his appearance shortly after the suit was instituted by the same attorneys who made the motion to have the agent of the President substituted for the director general. The court takes judicial notice of the fact as to who was director general of railroads and who was agent of the President under the Transportation Act of 1920.

In *McAdoo v. Booker*, 17 Ala. App. 623, 88 So. 196, it was held that the courts judicially knew that, at the time of the amendment to the complaint, Walker D. Hines and not William G. McAdoo was director general of railroads.

In *Payne v. White House Lumber Company*, 231 S. W. 417, the court held that judicial notice would be taken of the fact that at a certain time John Barton Payne was the agent of the company, and that Hines was no longer the director general or entitled to represent the government.

Courts take judicial notice of a change in the incumbency in office of the director general. 19 A.L.R. 699.

In *Bailey v. Hines*, 109 S. E. 470, damages were sought for an injury which occurred during the period of Federal control. The action was brought against Walker D. Hines, Director General of Railroads and his successor in office, as the agent provided for in Section 206 of the Transportation Act. The defendant pleaded in abatement that before the institution of the action, he had resigned and that John Barton Payne had been appointed in his stead.

The plaintiff asked leave to amend his declaration and writ by substituting the name of John Barton Payne for that of Walker D. Hines, and later, it having developed that Payne having resigned and that James C. Davis had been appointed in his stead, the plaintiff asked for liberty to amend by substituting the name of James C. Davis for that of Walker D. Hines. The court refused both requests and entered judgment dismissing the plaintiff's action.

In a decision of the case, the court among other things said: "The agent designated by the President, under section 206 of the Transportation Act, approved February 28th, 1920, as accurately describes the presidential agent ~~as~~^{as} Director General of Railroads as does the appointee to that position. Congress, it was declared, did not intend to place technical difficulties in the way of the assertion of their rights by the public, and the error charged in the use of the name of Walker D. Hines instead of that of John Barton Payne, was of a purely technical defense."

In Payne v. White House Lumber Company, 221 S. W. 417, John Barton Payne, agent, was substituted as party defendant in place of Walker D. Hines, in accordance with the provisions of the Transportation Act, judgment being rendered accordingly, although no citation or notice to Payne was issued. Exception was taken on this score. As to the method by which the agent under the Transportation Act, should be made a party, the court said: "We regard the question as one of the practice for determination by the forum where the litigation is pending, and that the transition from Hines to Payne as party does not abate the suit and does not affect the rights of the complainant, but preserves his rights, and therefore any method by which Payne may be made a party, satisfying the practice in the court where the suit is pending, we presume would be sufficient to continue the litigation to final judgment in the name of Payne. In the state, while notice or citation is ordinarily required to bring in a new party, yet such notice or citation may be waived by making an appearance; and we think, under the facts of this case, that the court was

justified in holding that the attorneys whose names were signed to the pleading for Hines were in fact, the attorneys representing John Barton Payne, agent under the Transportation Act."

The venue of suits against a Federal agent on causes of action arising out of the operation of any particular railroad by the government, is that fixed by law for the prosecution of such suits of such causes of action as if they had risen against such carrier. Payne v. Coleman, 232 S. W. 537.

Soucie, Admr. v. John Barton Payne, Director General of Railroads, 299 Ill. 552, was a suit instituted against John Barton Payne, agent under the Federal Control Act, of the Chicago and Eastern Illinois Railroad Company, to recover damages for injuries sustained by Soucie. A judgment was obtained in the Circuit Court and the case was appealed directly to the Supreme Court, on the theory that a constitutional question was involved. It was among other things urged that the court erred in the admissibility of certain testimony, namely; of an ordinance limiting the speed of passenger trains to ten miles an hour and in a decision of the case, the court among other things, at page 558, said: "It is further contended by plaintiff in error that the Chicago and Eastern Illinois Railroad at the time of this injury, was being operated by the United States Government on a fixed schedule of time. The fact that the railroad was being operated by the government in that manner under the Federal Control Act is not a sufficient ground to make any change in the decisions of this court or of the Federal Court upon that question. Section 10 of the Federal Control act provides that the carriers, while under federal control, shall be subject to all laws and liabilities as common carriers, whether arising under the state or federal laws, or the common law."

In view of the rules as announced by the different courts as herein indicated; and of the fact that the attorneys representing the Director General entered his appearance, and that the same attorneys representing the agent of the President under the

Transportation Act, made the motion to substitute the agent for the Director General, and which was allowed and the agent became the sole defendant; that while the case was pending against the Director General, the cause was continued by agreement of the parties to the suit, and that this is a transitory action, and under the law of Illinois, suit can be brought in any county where service can be had on the defendant or defendants, we are therefore of the opinion notwithstanding general order 18-B that the appellee was in court and that the court had jurisdiction of the defendant in La Salle County.

Furthermore, in Lerette v. Director General of Railroads, et al., (James C. Davis, agent of the United States, appellant,) 306 Ill. 348, judgment was obtained in the Circuit Court of La Salle County against the Chicago, Burlington and Quincy Railroad Company and the Director General of railroads. On appeal to this court, a motion was made to substitute for the railroad company and the director general, the agent of the United States, which motion was allowed and on the hearing of the case in the Supreme Court, James C. Davis, as agent of the United States, appeared in that court and contended that it was error to sue the original defendants jointly on the ground that the railroad was being operated by the Director General and that he alone was liable for any damages growing out of such operation and that the judgment, being a joint one, must stand as to both defendants, or fall as to both. Davis, as agent of the United States was not a party to the record in the circuit court. In the decision of the case, at pages 356-357, the court among other things said: "The agent of the United States is the successor in office of the Director General of Railroads, and it was proper to substitute the agent for the Director General. The same counsel appeared for both defendants in the circuit court, and no question was ever raised by the Director General, the predecessor in office of appellant (Davis, agent) that there was

a misjoinder of parties defendant. No motion was made to dismiss as to the railroad company, no separate motion was made to find the issues for the railroad company, no point was raised in the written motion for a new trial that the railroad was not a proper party and no assignment of error was made in the Appellate Court raising this question. * * * * * If the question had been raised in the circuit court, appellee could have taken a judgment against the agent, the successor of the Director General, alone, notwithstanding the declaration charged joint negligence and there was a verdict finding joint liability. * * * * * There is really but one interest represented by the defendants. When John Barton Payne, agent of the United States appeared and defended for and in the place of John Barton Payne, Director General of Railroads, the substitution required by Section 206-D of the Transportation Act was effected for all practical purposes." If the court did not directly hold that the agent was bound by the acts of his predecessor, the Director General, there being but one interest involved, the inference can readily be drawn from the language used that that was what the court had in mind.

When *Lerette v. Director General, et al*, was before the Appellate Court, 225 Ill. App. 93, the court at pages 103-104 said: "Section 206 of an act of Congress of February 28th, 1920, authorizes the President of the United States, after the termination of Federal control over railroads, to appoint an agent who shall be substituted for the Director General of Railroads in actions then pending and to permit such actions to be prosecuted to final judgment. * * * * *

We understand the meaning of that act to be that no notice is required to such agent, but that, upon an order of substitution being made, he is considered as in court, and thereafter bound by the subsequent proceedings."

There are three cases in particular relied upon by appellee

in support of its contention. We have examined those cases, and find the facts are entirely different from what the facts are in the case under consideration. Inasmuch as the agent of the United States appointed by the President by virtue of the Transportation Act and the Director General, represented the same identical interests, it necessarily follows that Davis, as agent, would be bound by the acts of his predecessor who was the Director General of Railroads under the United States Administration Act.

Since the Director General entered his appearance and was in court, and it is not contended to the contrary, and as the director general and the agent represented the same interests, and the agent on his own motion was substituted as the sole defendant, we think the agent is not in any position to now insist that he is not in court.

Much has been said by the appellee relative to the question of practice. It is the contention of appellee that the proper practice would have been for the appellant to have made a motion to strike the plea of abatement from the files. In our opinion, after the agent had become a party to the suit by substitution, he was not then in a position to file the plea in abatement. Regardless of the question of practice, the question was tried out before the circuit court on the demurref to the plea. If it be true that the Director General entered his appearance and that the Director General and the Agent had submitted themselves to the jurisdiction of the court, then notwithstanding the order set up in the plea, the contention of appellee was not well taken.

In conclusion we have a case in which the suit had been instituted against the Director General as was authorized by law. Service was had and the Director General entered his appearance. His successor representing the same interest subsequently, invoked the jurisdiction of the court and asked to be made a party and then later on assumes the position that the court was without jurisdiction

in support of its position. The court, however, was not
the facts as actually presented to it. It was not
under consideration. The court was not
appointed by the President of the United States, and
the Director General, representing the same, was
necessarily follows that the court, as a body, is
acts of his predecessor who was the Director General of
under the latter's administration.

Since the Director General's position is a
court, and it is not considered as a court, the
General and the court represented the same interest, and
on his own motion, as a court, as a body, is
the court is not in any position to act as a court in
court.

It has been said by the Director General that
of practice. It is the position of a court, and
also would have been for the court to have been
strike the plea of abatement from the file. In the
the court had before it the plea of abatement, and
then in a position to file the plea of abatement. The
question of practice, the question was tried and
court on the ground of the plea. It is the position
General entered his appearance and that the Director
court had limited jurisdiction to the question of
then notwithstanding the order of the court, the
of appeal was not taken.

In conclusion we have a case in which the court
tured against the Director General, and was
was had and the Director General entered his
or representing the same interest, and the
diction of the court was asked to be made a body, and
on assumes the position that the court was not

entirely to maintain a suit against anyone. The court had jurisdiction of the subject matter and we are of the opinion, by reason of the act and conduct of the Director General and of the Agent, Davis, together with that of their respective counsel, the agent has waived the right to raise the question by virtue of said order 18-B. We therefore conclude that the judgment of the Circuit Court of La Salle County should be reversed and the cause remanded which is accordingly done.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 3rd day of
august in the year of our Lord one thousand
nine hundred and twenty six

Justus L. Johnson
Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

242 I.A. 650

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 26 1926 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Relinquished 7-10-26

Nora B. Prunk,
Appellant,

v.

George W. Prunk,
Appellee,

Appeal from the
Circuit Court of
Bureau County

242 I.A. 650

Jones J.

Appellant, Nora B. Prunk, filed her bill in equity in the circuit court of Bureau County against appellee George W. Prunk, her husband, for separate maintenance alleging extreme and repeated cruelty and habitual drunkenness, and upon her petition, the court made an order requiring appellee to pay \$40.00 a month for temporary alimony for the support and maintenance of appellant and her two daughters, and \$100 to be applied on her solicitor's fees. The parties stipulated "that the complainant has a good cause of action for separate maintenance; and that the defendant controverts only the amount of separate maintenance, and the question as to the amount to be allowed to the complainant is submitted to the court for trial and determination." Therefore the only question inquired into was what allowance should be decreed for the support and maintenance of appellant and the two children of the parties, who were living with appellant. After hearing the testimony the court entered a decree ordering appellee to pay appellant for the support and maintenance of herself and the two children, Lois and Margaret, \$40 a month and an additional \$100 for solicitor's fees. From this decree appellant has prosecuted this appeal.

Appellee was a farmer and the parties lived together on his farm of 160 acres in Bureau County for about twenty-eight years and until she left him in July, 1923, on account of the misconduct complained of in her bill of complaint. Four children were born of the marriage, one of whom died. Ruth, the oldest, is married. Lois, 19 years of age, and Margaret, 16 years old, went with appellant when

she separated from appellee and are now living with her in the village of Tiskilwa. Lois is a helpless cripple as a result of infantile paralysis. She and Margaret have been cared for, fed, clothed, and schooled by appellant ever since her separation from appellee. The crippled daughter has been taken to and from school in an automobile and was to graduate from the high school in Tiskilwa in 1925. Margaret still attends high school there. The testimony tends to show that the value of appellee's farm is at least \$28,000, and one of the witnesses placed its value at \$175 to \$190 an acre. He also owns residence property in Tiskilwa worth \$1500 to \$1700, and 80 acres of land worth \$1000, or a total of \$30,500 worth of real estate owned by him. He has bonds, bank stock and notes of the face value of \$7498, but \$2318 of the notes are of doubtful value. The farm is rented to his daughter Ruth and her husband at \$1000 a year. The house in Tiskilwa rents for \$180 a year and the 80 acre tract was rented in 1923 for ten years for \$500, but this rent was paid in advance. Omitting any income from the notes which appellee claims are doubtful, his annual income is \$1456.20. Including income on them his total income would be \$1595.28 annually. He claims to owe \$1293. At the time of the hearing he was 58 years old and for 22 years had worn a truss for rupture, but was able to do manual labor and look after his farm. Appellant does not own a home but at the time of the hearing was boarding the owner of the house where she lived, and doing his washing, ironing, mending and caring for his room in payment of rent for the rooms occupied by her and her dependent children. Rents in the village of Tiskilwa are from \$15 to \$35 per month. Since her separation from appellee, she worked all night in a cafe at Princeton for eight months. She sent the children to school at Tiskilwa, where the crippled daughter would not be compelled to go upstairs as she would have to do at Princeton. It is necessary to keep these two sisters

together so that the younger one can assist her helpless sister.

Appellant has no special craft or learning, and all that she can earn is by physical toil. She has \$5000 loaned at 5%, and this with her clothing and a few pieces of furniture is all the property she has. It appears that she uses the furniture in the house where she lives. She has expended for braces and sanitarium fee for the crippled daughter about \$300. She has also bought a rug, kitchen table, dining table, carpets, and rocking chairs. She is fifty-five years old, fairly well, but not strong.

In our judgment the amount allowed for the support and maintenance of appellant and her two children under the circumstances is inadequate to provide for their necessities. In cases of this character the amount of the allowance must be determined by the needs of the wife and children, their station and circumstances in life, and by the husband's ability to pay. (Porter v. Porter 162 Ill. 398 p. 401.) The amount, if any, to be allowed a wife for separate maintenance depends not only upon the question of the misconduct of the husband, but also upon the amount of their property and income, as well as their ages, health, past and present habits, social condition and circumstances, and the requirements of their children, if any are dependent upon the parents for support. The amount of alimony to be allowed in a separate maintenance suit is to be determined in the same manner as in a case for divorce. (Decker v. Decker 279 Ill. 300 p. 308.) It is proper to consider the circumstances of the case, including the misconduct of the husband. (Harding v. Harding 180 Ill. 481 p.506; Johnson v. Johnson 125 Ill. 510.)

In this case the stipulation admits the misconduct of appellee. He owns and possesses real estate and personal property worth from \$35,000 to \$40,000. His gross income is at least \$1456.20 annually. In our judgment the allowance of \$40 a month for the support and maintenance of his wife and two daughters is obviously inadequate, when measured by the standard fixed by the Supreme Court. Supplemented with the income of \$250 a year from her own money loaned, it is not suffi-

... ..

cient for their present actual necessities. Under the circumstances his financial obligation to his family cannot be discharged by a less sum than \$60 a month, and the record shows that he is financially able to pay that amount.

The decree of the circuit court will accordingly be reversed and remanded with directions to the chancellor to enter an order requiring appellee to pay to appellant the sum of \$60 a month for the support and maintenance of herself and the two children, Lois and Margaret, until the further order of the court.

Reversed and remanded with directions.

STATE OF ILLINOIS,
SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 26th day of
August in the year of our Lord one thousand
nine hundred and twenty- six

Justus L. Johnson
Clerk of the Appellate Court

5469
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

242 I.A. 650

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 26 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Relator's motion for writ of habeas corpus

Eugene O'Brien, Appellant,
vs.
R. P. Miner & Company, Inc.
a Corporation, Appellee

Appeal from the
Circuit Court of
Knox County.

242 I.A. 650

Jones J.

This is an action in assumpsit for the recovery of \$522.41, being one-half of the proceeds of the sale of wheat. The suit arises from a dispute over the ownership of the wheat. The cause was tried by the court without a jury and a judgment was entered infavor of appellee.

Sherman Dunn was the guardian of two minors who were the owners of a farm in Warren and Mercer counties, containing 355 acres. He entered into a written lease with Harry H. Adcock for all of said premises, beginning March 1, 1923 and ending March 1, 1924. The rent agreed upon was \$6 an acre for 105 acres of grass land, payable March 1, 1924, and one-half of all grain raised on the premises. The tenant moved on the farm and took possession of it under the lease. In the Fall of 1923, without having entered into a new lease for the next year, and without conferring with his landlord, he sowed 55 acres of the land in wheat, In February 1924 he was in straitened financial circumstances and told his landlord that he would not be able to farm the land another year. He failed to pay the cash rent due under the lease, and on March 3, 1924 was adjudged a bankrupt. All of the land which wasto be put in crops in 1924 was rented to other persons. Adcock continued to occupy the tenant house, but cultivated none of the land, except as a laborer for hire, and attempted to perform none of the obligations required of him under the lease of March 1, 1923. His horses and farming implements were sold by the trustee in bankruptcy.

At the public sale of such personal effects, the trustee offered an undivided one-half interest in said growing crop of wheat as the property of Adcock, but announced that the sale would be

at "buyer's risk", as he doubted that the bankrupt had any interest in the wheat. Appellee, O'Brien, endeavored to ~~harvest~~ it, but ~~was~~ prevented from doing so by the guardian, who harvested it and sold it to appellant. The latter has retained the agreed price, pending the determination of the question of ownership between O'Brien and the guardian.

O'Brien claims that the notice given appellee by the tenant of his desire to give up the land because of his inability to handle it, did not constitute a surrender of possession of the leased premises, but that his occupancy of the house after March 1, 1924 did constitute a holding over of the entire premises. He relies upon the principle laid down in Clinton Wire Cloth Co. v. Gardner 99 Ill. 151, that where a tenant for a year or years holds over after the expiration of his lease, without having made any new arrangement with his landlord under which such holding over takes place, the landlord may, at his election, treat the tenant as a trespasser, or as a tenant for another year, upon the same terms as in the original lease. Appellant insists that the landlord in this case elected to treat Adcock as a tenant and acquiesced in his holding over by permitting him to occupy the tenant-house and by causing a distress warrant to be served on him, August 29th, 1924. It is conceded that unless a new tenancy was created under the law, by a holding over on the part of the tenant, acquiesced in by the landlord, appellant cannot succeed in this suit. A determination of this question will be decisive of the case without regard to the other questions which have been raised by the assignment of errors.

A holding over by a tenant, acquiesced in by the landlord, creates a new tenancy for another year upon the terms of the original lease. Such new tenancy arises from the facts through an implication of law and not out of any agreement or understanding between the parties. The implication of law excludes the existence of any new and different arrangement between the parties. Therefore, if the occupancy by a tenant is under a new arrangement or agreement with the landlord, his tenancy arises out of such arrangement and not by implication of law. Under the facts in this case, it is ob-

vious that the tenant did not intend to hold over under the lease of March 1, 1923, and it is equally obvious that the landlord never believed the tenant was endeavoring to hold over under such lease. The proof discloses an evident purpose of the tenant to terminate the lease on March 1, 1924, and of the landlord's purpose to abide by the tenant's decision. The verbal notice given by the tenant in February 1924, as well as his petition to be adjudged a bankrupt, filed immediately upon the termination of his written lease, his subjecting his farm implements to sale, his performance of occasional labor on the premises for hire, his entire failure to perform any of the duties imposed upon him by the lease, and his omission to claim any right under it, all rebut the claim of his holding over under the terms of his old lease for another year. And appellant's contention that the landlord recognized Adcock was holding over and acquiesced in it, is overcome by the proof that during the Spring of 1924, the landlord leased the portion of the farm which was to be put in crops, to other parties, who cultivated it.

Appellee caused a distress warrant to be served upon the tenant and it is claimed that, ~~but~~ by such action, he recognized Adcock as a tenant. It is true that the bringing of a suit for rent against a tenant, who has held over, without any new agreement, will amount to an election to create a new tenancy for another year. (Peck v. Christman 94 Ill. App. 435; Williams v. Veeder 195 Ill. App. 413). But this rule of law applies only to cases where there is in fact a holding over on the part of the tenant; and such suit must be for rent which accrued after the holding over commenced and not before. In the instant case the landlord did not seek to recover any rent which accrued after March 1, 1924. The warrant on its face shows that the claim was for the cash rent which accrued under the written lease of March 1, 1923. Under this situation the distress warrant did not tend to prove an election by the landlord to recognize Adcock as a tenant after March 1, 1924. It is clear from the evidence that the continued occupancy of the house by Adcock was under a new arrangement and not as a hold over under the written lease.

From a consideration of the evidence, our conclusion is, that there was no holding over by Adcock after the termination of his lease on March 1, 1924/. Therefore the various propositions of law submitted to the trial court by appellant were not applicable to the facts in the case and were properly refused. The trial court arrived at a correct conclusion and its judgment must be affirmed.

Judgment Affirmed.

From a consideration of the evidence, the Commission is
of the opinion that the evidence is not sufficient to
show that the defendant is guilty of the crime charged.
The evidence is not sufficient to show that the defendant
is guilty of the crime charged. The evidence is not
sufficient to show that the defendant is guilty of the
crime charged. The evidence is not sufficient to show
that the defendant is guilty of the crime charged.

Respectfully,
[Signature]

Very truly yours,
[Signature]

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 26th day of August in the year of our Lord one thousand nine hundred and twenty-six

Justus L. Johnson
Clerk of the Appellate Court

abstract

547702
AT A TERM OF THE APPELLATE COURT,
Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

242 I.A. 651

SEP 15 1926
BE IT REMEMBERED, that afterwards, to-wit: On
the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

People of the State of Illinois,

Defendant in error,

vs.

Error to County Court of

Warren County.

Thomas Lammerts,

Plaintiff in error,

242 I.A. 651

Jones, J.

An information consisting of two counts was filed in the county court of Warren County. The first count charged plaintiff in error with the sale of intoxicating liquor in violation of the Prohibition Act. The second count charged him with unlawful possession of intoxicating liquor in violation of the same act. The information was verified by the sheriff of that county. By leave of court the state's attorney amended the second count and plaintiff in error moved to quash the information. The motion was overruled and he entered a plea of not guilty. When the case was called for trial, the state's attorney, by leave of court, amended the first count by inserting the words "then and there" before the words "fit for beverage purposes" and a nolle prosequi was entered as to the second count. Plaintiff in error thereupon renewed his plea of not guilty. A trial was had before a jury and plaintiff in error was found guilty. He was sentenced to pay a fine of \$700 and to be imprisoned in the county jail for a period of three months. From that judgment he prosecutes this writ of error.

It is contended that because the information was not re-verified after being amended, it will not support a judgment. After the first count of the information was amended, plaintiff in error made no motion to quash the same, but re-entered his plea of not guilty to the first count as amended, and the cause proceeded to trial. The cases cited by plaintiff in error in support of his contention are not in point. ~~The~~ In *The People v. Shockley*, 211 Ill. 255, the information was supported by an affidavit upon information and belief. Upon motion to quash, based upon that ground, an amendment

STATE OF NEW YORK

IN SENATE

1911

REPORT

OF THE

COMMISSIONERS OF THE LAND OFFICE

ALBANY:

THE UNIVERSITY OF THE STATE OF NEW YORK, 1911.

PRINTED BY THE UNIVERSITY OF THE STATE OF NEW YORK, 1911.

WITH THE SALE OF THE LANDS OF THE STATE, 1911.

THE SECOND ANNUAL REPORT OF THE COMMISSIONERS OF THE LAND OFFICE.

CONTAINING THE REPORT OF THE COMMISSIONERS OF THE LAND OFFICE.

VERIFIED BY THE COMMISSIONERS OF THE LAND OFFICE.

THE COMMISSIONERS OF THE LAND OFFICE.

MOVED TO THE NEW YORK PUBLIC LIBRARY, ASTOR LENOX AND TILDEN FOUNDATIONS.

ENTERED AS SECOND-CLASS MAIL MATTER, MAY 1, 1909.

THE STATE OF NEW YORK, 1911.

IN SENATE.

THE COMMISSIONERS OF THE LAND OFFICE.

NOT PRINTED.

THE COMMISSIONERS OF THE LAND OFFICE.

AS AUTHORIZED BY THE COMMISSIONERS OF THE LAND OFFICE.

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THE COMMISSIONERS OF THE LAND OFFICE.

was made by striking out the clause as to information and belief, without re-verification. Thereupon the motion to quash was renewed. The case of *The People v. Elias*, 316 Ill. 376, also cited by plaintiff in error, is not in point. Plaintiff in error does not contend that the original information was insufficient but only that the state's attorney evidently thought it was; nor is any complaint made to the amended information, except that it was unverified. That objection was waived by failing to move to quash the amended information. The objection to the information is not tenable. (*People v. Powers*, 283 Ill. 438; *People v. Grady*, 217 Ill. App. 490, p. 493; *People v. Severinghaus*, 313 Ill. 456, p. 472; *People v. Arey*, 318 id. 305, p. 306).

The conviction in this case rests upon the testimony of Leland Lewis and Wilson Lusk. The evidence shows that on May 3, 1925, the date of the alleged sale, plaintiff in error was living in the Village of Swan Creek, about 20 miles from Monmouth in Warren County, and was there conducting a restaurant and pool room in part of a building. He occupied the remainder of the building with his family as a residence. On the night of the alleged sale and at the time fixed by Lewis and Lusk, plaintiff in error, with his 17 year old son and one Earl Morris, were waiting on the trade in the restaurant. His wife was also waiting on the trade and washing dishes. Lewis testified that in April, previous to the alleged sale of liquor, he had made arrangements with the sheriff of Warren County "whereby he offered to pay me \$10 a head for every man that I bought a pint of liquor off of in Swan Creek." At the time of the alleged sale, Lewis was working in the county on a farm about six miles from Swan Creek and had known plaintiff in error about eighteen months, but was only ~~xxx~~ rarely in his restaurant. He testified that he followed the detective business about three months and wanted that included in the list of his vocations. He and Lusk testified that he bought the liquor in

question from plaintiff in error about one o'clock in the morning of May 3rd. Lusk claimed to have witnessed its sale and delivery. They claimed to have been playing pool about midnight in the pool-room adjoining the restaurant; that they had then gone into the restaurant and gotten something to eat; that they went out and came back later, going through the restaurant to the kitchen where they washed their hands; that at this time Lewis asked for the plaintiff liquor and ~~defendant~~ in error told them to go outside; that they met him outside on the walk at or near the front of the restaurant; and that the liquor was there delivered in a bottle to Lewis who paid \$2 for it about one o'clock. Lusk admitted he had never seen plaintiff in error before or since the night in question, and that he was entirely dependent upon what Lewis told him as to the identity of the person who sold the liquor produced at the trial. Lusk was asked several questions upon his cross examination, touching his ability to identify the defendant. The court sustained objections to some of them. Without detailing the questions and answers we think the court unduly restricted the cross examination. The identity of the person who sold and delivered the liquor in question was of vital importance. The testimony of the witnesses Lewis and Lusk that they were in the pool room and restaurant on the night in question stands alone. Plaintiff in error testified positively that they were not in his restaurant or kitchen that night, and that he did not deliver to them any intoxicating liquor or liquid of any kind in a bottle nor receive \$2 from either of them for any purpose. His son, who was assisting him in the restaurant that night, testified that they were not there after midnight nor from eleven totwelve. Although the evidence discloses that there was a large number of people in the restaurant around midnight, no witness testified to seeing Lewis and Lusk there or in the poolroom at any time that night. A disinterested witness who was at plaintiff in error's place of

business after eleven o'clock testified that he did not see Lewis. Plaintiff in error, his son, and another witness testified that the pool room was not open after eleven o'clock that night; another disinterested witness who was in the restaurant about twelve o'clock testified that the pool room was not open then.

On the trial eleven witnesses testified to the good reputation of plaintiff in error as a law abiding and law observing man in that community, where he had resided for about six years. Four witnesses who had known Lewis for sometime testified that his reputation in the vicinity where he lived for truth and veracity was bad. Some of them said they would not believe him on oath. One witness who knew Lusk for thirteen years testified to the bad reputation of Lusk for truth and veracity. There was no evidence offered by the People to contradict any of the character witnesses. If this conviction is to be sustained, it will have to be done upon the testimony of Lusk and his associate, Lewis, who was under contract to receive \$10 a head for every man from whom he could purchase liquor in Swan Creek. Both of these witnesses were impeached, and with the uncontradicted testimony of plaintiff in error's good reputation, the record should be free from substantial error before a conviction can be sustained.

Plaintiff in error's tendered instruction No. 9, was refused. It is as follows; "The court instructs the jury that one of the means recognized by law for impeaching the veracity of witnesses is the introduction of persons as witnesses who testify that they are acquainted with the general reputation for truth and veracity of the person sought to be impeached in the neighborhood in which he resides; and if the jury believe from the evidence in this case that the reputation for truth and veracity of any witness who has testified before you in the neighborhood where he resides is bad, then the jury have a right to disregard the whole of suc

person's testimony and treat it as untrue, except so far as it is corroborated by other credible evidence, or by facts and circumstances proved on the trial." There was no other instruction given to define this rule of law and inform the jury of its effect. The form of this instruction was approved in *Hill v. Montgomery*, 184 Ill. 220 and its refusal constituted reversible error.

The third instruction given on behalf of the People is complained of; but it was approved by this court in *People v. Wallace*, 235 Ill. App. 622. The People's 6th instruction is as follows:- "The jury are instructed that the rule requiring the jury to be satisfied of the guilt of the defendant from the evidence beyond a reasonable doubt in order to warrant a conviction is complied with, if, taking the testimony altogether, the jury are satisfied beyond a reasonable doubt that the defendant is guilty. The reasonable doubt that the jury is permitted to entertain to authorize an acquittal must be as to the guilt of the accused on the whole evidence and not as to any particular fact in the case not necessary to constitute the crime charged." The vice of this instruction is that it fails to tell the jury what facts constitute the crime charged, but leaves the jury to determine what facts are material. Counsel for defendant in error cites *People v. Murray*, 307 Ill. 343 (348) in support of his contention that the instruction is correct. In that case an instruction in the same language omitting the concluding words "not necessary to constitute the crime charged" was criticised. The court said, "It is open to the objection that it is too general and might be misconstrued. The reasonable doubt that a jury are permitted to entertain to authorize an acquittal must arise on the whole evidence or some particular fact necessary to constitute the crime, and the instruction should have been so limited." The opinion merely states the law and does not purport to give the language that should be used in an instruction. It is a fundamental requirement that the accused be proven guilty

of the crime charged in the indictment beyond a reasonable doubt. It is difficult to conceive of this being done without the jury being satisfied on the proofs of all the facts necessary to constitute the crime beyond a reasonable doubt. While it has been said that it is not necessary to prove beyond a reasonable doubt every link in the chain of circumstances surrounding the commission of the crime charged, it has never been held to be the rule that the State need not prove the essential elements of the crime or the facts necessary to constitute the crime beyond a reasonable doubt. (People v. Mooney, 303 Ill. 469 (475)). While every fact is not required to be proved beyond a reasonable doubt, certain facts must be so proved, and it is not proper, after advising the jury that every fact need not be proved beyond a reasonable doubt, to direct a verdict of guilty if the jury believe, from the whole evidence, that the defendant is guilty, without informing them what facts must be proved beyond a reasonable doubt to authorize a verdict of guilty. (People v. Prall, 314 Ill. 518; People v. Davis, 300 id. 226). It is not correct to say that a reasonable doubt as to any particular fact in a case is not sufficient to justify an acquittal, without distinguishing between facts which are material and constitute a necessary element of the crime and those which are not so material and necessary. (People v. Johnson, 317 Ill. 430; People v. Seff, 296 id. 120). Our attention has been called to People v. Scarbak, 245 Ill. 435 as authority for a different rule. The instruction in that case was considered by the court in connection with the first given instruction and it was held that inasmuch as the first instruction was in ^{the} language ₁ of the statute and omitted no essential element of the crime charged, as it existed at common law, the error complained of in the second instruction was not tenable. But whether there be an apparent conflict in the reported cases or not, the later holdings of the Supreme Court are uniformly to the effect that

such an instruction as given in this case is erroneous.

The People's 7th instruction on the question of credibility concluded "You should determine the amount of credence to which each statement is entitled at your hands as reasonable and intelligent men." A similar instruction was before this court in *People v. McClary*, 240 Ill. App. 261 and we there held that while the instruction was criticised in *People v. Krauser*, 315 Ill. 485 it was not clear that it was condemned as reversible error, but we also held that the instruction should not have been given. An instruction repeatedly condemned should not be given. (*People v. Blair*, 266 Ill. 70). Complaint is made of the 9th instruction given on behalf of the People but a similar one was approved in *People v. Scarbak*, *supra*, and an identical one was also approved in *People v. Rees*, 268 Ill. 585, where the same reason was urged for its condemnation as in the case at bar. We do not think the conviction based upon the record in this case should be allowed to stand. The judgment of the county court of Warren County is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 16th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty six.

Justus L. Johnson
Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

242 I.A. 651

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 15 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

The Henry National Bank,

appellee,

vs.

Appeal from the Circuit Court

of Peoria County.

W. A. Rowe,

appellant,

242 I.A. 651

Jones, J.

On July 27, 1925, appellee, The Henry National Bank, obtained a judgment by confession in the circuit court of Peoria County during the May Term, 1925. The narr described a demand note dated January 20, 1921, for \$4,000 payable to appellee with 7% interest from date and signed by W. A. Rowe. Judgment was entered for \$1135.40. On September 15th following, appellant filed his motion in the circuit court, supported by his affidavit, to set aside the judgment and for leave to plead. The grounds of the motion were that the signature was not the true signature of appellant; that he did not sign the note and power of attorney and did not receive any of the consideration represented by the note, or authorize its delivery or hypothecation. The affidavit states, among other things, that in the month of August, 1924, appellee presented the note in question to appellant and demanded payment; that appellant informed appellee he did not sign the note; that again in July, 1925, he told appellee's president that it was not his signature; and that the bank knew he claimed he was not the maker of the note. This motion was denied. Afterwards during the October 1925 term, appellant filed another motion in the circuit court to open up the judgment and for leave to plead. In this motion he assigned as grounds that he did not sign the note, or authorize or empower anyone to sign it for him, or acquiesce or consent to the placing of his signature thereon; that the signature on the note was not his true and genuine signature; that he did not acquiesce, ratify or consent to it, and that the note was without consideration. The supporting affidavit was to the same effect.

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The motion was allowed and appellant filed three pleas; 1st, the general issue; 2nd, non est factum; and 3rd, a plea of want of consideration. The pleas were sworn to by appellant. With them he filed an affidavit of merits. Issue was joined on the pleas and the cause was tried before a jury and a verdict returned for appellee. Judgment was rendered that the judgment theretofore entered stand, and this appeal followed.

It is the contention of appellant that the note has been altered; that the alteration is apparent on the face of the note; that the court erred in admitting the note in evidence without explanation of the alteration, and in refusing to direct a verdict for appellant; and that the verdict is contrary to the evidence. All of the questions in this cause can be determined under the issue as to whether or not the note had been altered. There are two lines for signature printed on the face of the note. The name of appellant appears upon the second signature line. The initial "a" in his name is a small letter. It is not claimed that he did not in fact sign this note, but it is asserted that the first signature line of the note originally bore the signature of "F. R. Dennis" and that the same has been erased by means of acid or some other device. It is claimed that faint lines in the paper show the letters "F. R. D." and the last two letters of "Dennis". The evidence shows that after the note was placed in judgment, it was put among the disposed of files in the back room of the circuit clerk's office where anyone had liberty to go. Sometime later the circuit clerk, in company with one of the attorneys, then representing appellant, took the note to Chicago where it was submitted to an expert for examination. Upon his return home from Chicago, the clerk again placed the note in the disposed of files and left it there until the time of the trial. The expert took two photographs of it and at the hearing testified that in his opinion it had been altered. The attorney, who

The notion was raised and considered this morning, but the
general feeling was, however, that the
consideration. The matter was then referred to the
he filed an affidavit of merit. The court then
and the other was not a matter of fact but a
appeals. Judgment was rendered that the
entered appeal, and the appeal dismissed.

It is the contention of counsel for the appellant
that the appellant is entitled to a new trial on the
ground that the court erred in admitting the evidence of the
explanation of the signature, and in finding it to be a
false signature; and that the verdict is against the
evidence. All of the evidence in this case has been
the issue as to whether or not the appellant was
are two lines for signature written on the back of the
name of appellant appears upon the back of the
initial "W" in this case is a false signature. The
that he did not in fact sign the signature, but that
the first signature line of the note which was the
of "W. H. Bennett" and that the signature of "W. H. Bennett"
sold of some other person. It is claimed that the
the paper show the initials "W. H. Bennett" and that the
of "Bennett". The evidence shows that after the
in judgment, it was not necessary to consider the
room of the circuit clerk's office where the
No. Sometime later the circuit clerk, in connection with the
statement, then representing appellant, took the
where it was admitted to an expert for examination. When he
return home from Chicago, the circuit clerk did not know the
disposal of files and that it was not until the
the expert took two photographs of it and it was then
that in his opinion it had been altered. The circuit clerk

accompanied the clerk to Chicago, withdrew from the case at the beginning of the trial and also testified. We are of the opinion that appellant's contention that the note has been altered cannot be sustained by the proof. The note is on paper of inferior quality. The fluid ink and ink from the rubber stamp which was used on the back of the note in making endorsements of payments went through the paper, so that they show on the opposite side. Upon careful examination we think that what appellant claims are letters forming part of a signature of F. R. Dennis are merely certain figures and marks, which appear upon the back of the note in the endorsements, and which came through the paper. It is true there is a discoloration on the face of the note in the blank above the first signature line, but how, when, or under what circumstances it was made does not appear in the evidence. On the other hand, there is positive evidence that at the time of the hearing the note was in the same condition as when it was signed. Several witnesses testified to having seen appellant sign it and that there was no other signature on it at that time. There is evidence tending to show this note was given in renewal of other notes of appellant held by appellee. The back of the note shows that appellant made 7 payments on it covering a period of over 2½ years. Some of the payments were of interest. There was one payment of \$2000 and another of \$1000 both on the principal.

Both when appellant made his motion to set aside the judgment and when he made his motion to open it up, he filed his affidavit setting forth that the signature was not his and that there was no consideration for the note. His affidavit of merits contained the same statements. In none of the affidavits or motions did he say anything about any other signature having been on the note. He stated in his first affidavit that appellee presented the note

to him and demanded payment, and that he informed appellee he did not sign it. It is difficult to understand why he did not allege that the note was not his obligation alone if it had ever borne the signature of any other person. Appellant is a man about 84 years of age, not in good health, but the evidence shows he was in the city of Peoria on the first day of the trial, but was not called as a witness. The same attorney who went with the circuit clerk to Chicago testified that appellant was brought to Peoria for the purpose of attending the trial and was in the court house about noon the first day of the trial; that he was weak and unable to stay, and had to be sent home. He did not know whether appellant came the second day of the trial or not, and did not know whether he could come or not. Apparently no effort was made to have him testify.

The expert who made the photographs testified that he made the pictures on August 5, 1925, developed the film within a week afterward in New York, where he went on business, and sent some prints from there to the attorney who was with the circuit clerk when the pictures were taken. Yet the first motion to set aside the judgment on the note was not made until September 15th, and his motion to open up the judgment was not made until October 7th. The said attorney called at appellee's banking house on September 3, 1924 before suit was brought on the note. He asked to see it and stated appellee said he did not sign it. He there said the signature looked a great deal like appellant's signature, except the "a". He also drew the original affidavit to open up the judgment. These significant facts tend to show that the defense of alteration was an afterthought.

Appellant insists that the note showed an alteration on its face and therefore the court erred in admitting the note in evidence without explanation of the alteration. If the instrument did in fact show an apparent alteration, it was the duty of appellee before

it was admitted in evidence to explain the alteration. However, appellee proved that the note was in the same condition at the time it was offered in evidence as when it was signed. After careful examination of the note we cannot agree with appellant that there was any alteration apparent on the note and it was a question for the jury to determine whether or not it had been altered. (Conkling v. Olmstead, 63 Ill. App. 649 (650); Merritt v. Dewey, 218 Ill. 599.)

The trial court refused to permit the expert witness to attempt a restoration of the alleged erased signature before the jury by chemical fumes. There was no error in such refusal. (Moon v. Roberts, 170 Ill. App. 367; Mueller Bros. Art & Manufacturing Co. v. Fulton Street Wholesale Market Co., 181 id. 685.) The giving and refusal of other instructions are complained of, but we feel that the trial court fairly instructed and that substantial justice has been done. The judgment is accordingly affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court at Ottawa, this 16th day of Sept., in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court

Abstract

5473
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

242 I.A. 651

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 15 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Charles Dickerson,

appellant,

vs.

Appeal from the Circuit Court
of Warren County.

Rachel Reed, et al,

appellees,

Jones, J.

242 I.A. 651

This is an appeal from a decree of the circuit court of Warren County. Appellant filed his bill therein against appellees to set aside the release of a certain mortgage and to foreclose the same. This suit was filed to the September Term, 1924 of that court. Appellees answered the bill and the cause was referred to a special Master, who reported that appellees were defending as widow and heirs at law of Robert Reed and that appellant was an incompetent witness; that appellant had failed to prove the material allegations of his bill; and recommended that the prayer of the bill be denied and the bill dismissed for want of equity. Objections to the special master's report were filed and overruled. By stipulation the objections stood as exceptions. On the hearing the court overruled the objections, approved the special master's report, and dismissed the bill for want of equity. The bill alleges that on August 31, 1916, Robert Reed and Rachel Reed, being indebted to Charles V. Wallace in the sum of \$800 made and delivered their promissory note for that sum and executed the mortgage in question to secure its payment. The bill further alleges that the mortgage was recorded on September 1, 1916 and that the note and mortgage were assigned to appellee on or about September 2, 1916, for a valuable consideration. It then alleges the loss or destruction of the note and mortgage; that appellant never assigned, sold or delivered them to any other person and that he is still entitled to the proceeds thereof. This is followed by an allegation that Charles V. Wallace died in June, 1919, testate and that his executor made and attempt to release the mortgage on August 29, 1919, without any right or

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authority from appellant, and filed such pretended release for record. The death of Robert Reed with the names of his widow and heirs at law is next set out, and the bill concludes with a prayer for foreclosure and a cancellation of the release.

In 1916 appellant was a practicing lawyer in Galesburg. On August 29th of that year a complaint was made before a justice of the peace in Galesburg, charging one Charles Reed with rape. On the following day he was arrested and brought before the Justice. Appellant was employed to defend him. The cause was continued to September 9th with bond fixed at \$800. This bond was signed by the accused with John Reed and Daniel Swigart as sureties. On the latter date the cause was again continued to September 16th, when the accused waived preliminary examination and was bound over to await the action of the grand jury. His bond was fixed in the same amount and was signed by him with his father, Robert Reed, Charles V. Wallace and Daniel Swigart as sureties. At the November Term of the circuit court of Knox County, Reed was indicted and his bond was fixed at \$1000, which he gave with Robert Reed, Charlotte Hill and Charles V. Wallace as sureties. In March 1917, appellant went into the army where he remained until October 1919. The indictment was nolle prossed on January 11, 1919, and the sureties on his bond were released and discharged. It appears that appellant's attorney in the case at bar represented Charles Reed in the rape case after appellant went into the army. At the taking of testimony in the case at bar it was stipulated that objections to the competency of any witness or exhibits need not be preserved and should stand as to every question asked appellant. Appellant introduced the record of a mortgage for \$800 from Robert Reed and Rachel Reed to Charles V. Wallace dated August 31, 1916, recorded September 1, 1916, and the entry book showed the mailing of the mortgage to appellant on September 2, 1916. He testified that the mortgage was received by him through the mail and that Wallace later endorsed the note, and that his best recollection was that there was

some kind of endorsement or assignment upon the mortgage. He claimed to have retained possession of the note and mortgage until about April, 1917; that ~~xxx~~ following his entry into the army, his office was given up and his various files deposited at different places in Aurora; that after leaving the service he made search but was unable to find the note or mortgage. He further testified that the consideration of the endorsement was that the mortgage and note could remain with him to secure whatever expense he was required to go to in securing bondsmen, and for the further purpose of securing him for any expense or advance he might make and for fees for defending the Reed boy. Neither the note nor the mortgage was offered in evidence or produced. Charles V. Wallace, the mortgagee, died testate in 1917 and his will was probated in Warren County. J. W. Wallace, one of the defendants in this suit, qualified as executor and thereafter filed a bill to foreclose the mortgage in controversy in this cause. While that action was pending appellant received a letter pertaining to the mortgage from Earl Field, one of the attorneys for appellees in this suit. He wrote in reply that he knew the mortgage was given as security on account of the bond and not for money loaned. His letter also stated he thought he might have some written evidence to that effect, as he had written Hunt, and wished to do everything ~~in~~ his power to save Reed the property, offering to testify in the foreclosure suit. He wrote to Hunt, the attorney, who is now representing him in the present suit, in reply to a letter from him, saying Hunt was absolutely correct -- that the Reed mortgage was given to secure Wallace and that he did not suppose there was a person living who knew more about the transaction than he did. He also stated that if he had the office files he could go into details and it seemed to him that he had some papers that showed the fact, but they were stored; and that Reed should not lose the place. Hunt wrote to Field that from talks

with others who had charge of the rape case, he understood that the mortgage was given to protect Wallace against loss from signing Reed's bond and that he had no doubt he could furnish evidence to that effect if given time; that he thought Field would be perfectly safe in setting that up in his answer to the foreclosure suit, and upon reference to the master Hunt could get evidence to defeat the case. He suggested that Charles Reed and his father owed him a balance of \$25 on their note for his fee and if Mrs. Reed would pay that balance he could get the rape case off the docket, and then Reed's defense to the foreclosure would be complete. He wrote Field again stating that in the interest of Robert Reed he had succeeded in getting the rape case nollied and the defendant and sureties released on the bond, offering to produce a certified copy of the order showing defendant and sureties released. He enclosed one of the letters he had received from appellant and a carbon copy of the letter in reply. A carbon copy of a letter to appellant was introduced in evidence and neither Hunt nor appellant denied that it was a carbon copy of the letter which Hunt had written appellant, but neither of them identified it fully. Appellant admitted that he thought maybe it was a copy of such letter, and that his first letter to Hunt was written in response to a letter of which the carbon purported to be a copy. He added that it seemed to him there was another letter from someone relating to a previous mortgage and he was not sure whether the letters were in answer to that or some other letter. The carbon copy stated that the writer understood from appellant and others at the time Wallace signed the bond that Reed gave the mortgage to secure Wallace for signing the bond; that he didn't know whether the mortgage set up that or not, but he had always understood such was the fact and that appellant knew it. He asked what appellant knew about it and stated it looked like the old man would lose his home and he would hate to see that happen, and supposed appellant

would also. On the strength of the letters from appellant and the advice of his attorney, the executor of the Wallace estate dismissed the foreclosure suit and released the mortgage. Although the mortgage was due in March, 1917, appellant made no effort to collect his alleged claim against the Robert Reed estate nor did he notify any of the Reed heirs personally that there was anything due him until the filing of this suit. He made no specific search for the note and mortgage until January or February, 1924, when Hunt told him he wanted to know where they were, as he represented some of the heirs. In August 1923, Hunt, representing some of the distributees in the Wallace estate, filed written objections in the county court of Warren County to the executor's report claiming the executor had failed to account for the Reed mortgage.

The evidence shows that the note and mortgage were given to Wallace to indemnify him as surety on the bond of Charles Reed and fails to show that appellant was the owner of the note or mortgage in question or had any interest in them, or was entitled to any money under them or that he is entitled to any relief in a court of equity. There is no evidence in the record tending to show that the note or mortgage was ever assigned to him or that he ~~held~~ held either of them as security for any money due or to become due to him, ^{except his own testimony to that effect and he was incompetent} to testify for the reason that the defendant J. W. Wallace was defending as executor of the mortgagee's estate and the other defendants, except a tenant, were defending as heirs of a deceased person. (Sec. 2, Chap. 51 Revised Statutes; Mann v. Mann, 270 Ill. 83; Gladville v. McDole, 247 id. 34; Vail v. Rynearson, 249 id. 501) Even if his testimony had been competent, his letters and conduct are sufficient to estop him from now claiming any interest in the note and mortgage. The decree of the circuit court was right and will be affirmed.

Decree affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 16th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty-one

Justus L. Johnson
Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

242 I.A. 651

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 18 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



Isaac Thomason,

appellee,

vs.

Central Illinois Public

Service Company,

appellant.

Appeal from the Circuit Court
of Iroquois County.

242 I.A. 651

Jett, J.

Appellee, Isaac Thomason, obtained a judgment in the circuit court of Iroquois county, against appellant, Central Illinois Public Service Company, for personal injuries. An appeal was prosecuted to this court and the judgment was reversed. (Thomason vs. Central Illinois Public Service Company, Gen. No. 7489. Opinion filed September 29, 1925.) Upon the case being redocketed in the circuit court, there was a trial by jury, a verdict and judgment against appellant for \$3750, and an appeal has been prosecuted to this court.

In our former opinion we stated the facts together with the substance of the pleadings, and it will not be necessary to repeat them to any considerable extent.

It is insisted that the declaration did not state a cause of action, and that the court improperly overruled the motion in arrest of judgment. On the former appeal we held that both counts of the declaration were sufficient after verdict. The facts and pleadings were substantially the same upon both trials. The finding on the former appeal is conclusive upon this appeal. We are without authority to reconsider the question of the sufficiency of the declaration, and even if we did have authority to reconsider it, we see no reason for changing our views as formerly expressed.

It is next urged that the court improperly refused to direct a verdict for appellant at the close of all of the evidence, and that the court should have granted a new trial. The declaration consisted of two counts. The negligence charged in the first

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count was that the servants of appellant carelessly permitted a cross-arm to drop from a great height, to-wit, from the height of twenty feet, to and upon the ground, near said team which was attached to said disc and being driven by the plaintiff, so that the said team then and there became greatly frightened and ran away and got beyond the control of the plaintiff and he was injured. The negligence alleged in the second count was that the plaintiff was driving his team attached to a disc from said field to and upon the public highway near the said pole upon which the defendant's servants were working, and the defendant then and there by its said servants, negligently and carelessly permitted said cross-arm to drop from a great height, to-wit, from the height of twenty feet, to and upon the ground near said team so being driven by the plaintiff as aforesaid, whereby the same made a great noise and frightened said team attached to said disc so that said team ran away.

The undisputed evidence is that the servants of the appellant were dismantling certain electric wires from poles along the north side of a field in which appellee was driving a team of four horses abreast to a disc. Appellee finished his work and started to drive from the field through a gap in the fence at the east end of the field. The employes of appellant were working at this particular point. Some of the wires had been loosened and were hanging across the gap so that the team could not pass out. There were two poles directly west of this gap and there was a man on each pole. The cross-arms had been unfastened and the men were ready to drop them as the team started through the gap.

The evidence on behalf of appellee is that he stopped about twelve feet from the gap and then started to go through. When he got about even with the wires he heard something fall and the team jumped and ran away. He could not see what it was that fell but it sounded like something heavy just to the left of him or

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behind him. Percy Martin, the owner of the team, testified there was one man on the first pole about eleven feet west of the gap. The next man was on the second pole which was about one hundred twenty feet west of the first pole. He saw appellee start to drive through the gap and just as he got through, a cross-arm dropped from the second pole west of the gap. The witness was thirty rods west of the gap and ten rods down the field. He did not see the man on the pole throw the cross-arm, but he did see it fall. He was about 120 feet west of the team. On behalf of appellant the evidence is that there was a roan colt in the team which was nervous and prancing as appellee drove up to the gap; that the men raised the wires so the team could go through, and that no cross-arm was dropped and nothing unusual occurred, but just as the team got through the gap they started to run and appellee was injured.

Under this state of the proof there was evidence in the record fairly tending to support the allegations of negligence as contained in the declaration, and it was not the province of the court to take the case from the jury, but it was the duty of the court to submit the case to the jury for their determination. Upon the motion for a new trial it was for the court to determine whether or not the jury properly decided the questions of fact. If the evidence was sufficient to sustain the charge against appellant it was the duty of the court to overrule the motion for a new trial. Under the evidence the court properly overruled the motions to direct a verdict and for new trial.

It is insisted that the evidence does not show that appellee was in the exercise of due care for his own safety. This claim is based largely upon the fact that there were two gaps or openings from the field in which appellee was working out onto the road. One of them was the east gap through which appellee attempted to drive, and the other was some distance west of it. The men

were working at the east gap and were not working at the west gap. If appellee had gone out of the west gap there would have been no injury. The evidence shows that the house to which appellee was taking the team was east of the east gap, and if he had gone out of the west gap he would have to go some distance out of his way and cross the check rows in the field in which Martin was plaining corn. The mere fact that he drove out of the east gap could not be considered such an act of contributory negligence as barred a recovery.

The declaration as originally filed had an ad damnum of \$3000, and upon the first trial a judgment was returned for \$2500. The jury on the second trial returned a verdict for \$3750, whereupon appellee was granted leave to increase the ad damnum to \$4000, and it is insisted that this was error.

Section 39, of the Practice Act, provides that at any time before final judgment in a civil suit, amendments may be allowed on such terms as are just and reasonable, introducing any party necessary to be joined as plaintiff or defendant, discontinuing as to any joint plaintiff or defendant, changing the form of the act, and in any matter either of form or substance, in any process, pleading, or proceeding, which may enable plaintiff to sustain the action for the claim for which it was intended to be brought or the defendant to make a legal defense.

This section of the statute is very broad and covers almost every conceivable situation that might arise in a case so as to permit amendments of almost every kind and character before final judgment. In *Bemis v. Homer*, 145 Ill. 567, it was said:- "It is the policy of our statute allowing amendments, that neither party to an action shall be deprived of a substantial right through defects or omissions in pleadings, if they will use reasonable diligence to avoid that result by applying to the court for leave to amend, or supply the omission." In *Tomlinson v. Ernsshaw*,

112 Ill. 311, it was held that there was no error in allowing an amendment to a declaration by increasing the ad damnum after verdict, as such an amendment, relates to a matter of form rather than a matter of substance. In *Cottan v. National Mutual Church Insurance Company*, 209 Ill. App. 404, it was held that it was not error to permit an amendment increasing the ad damnum at any time before a judgment is finally entered. In *Wood v. Louisville & Nashville Railroad Company*, 183 Ill. App. 543, which was a personal injury case, the declaration as originally filed claimed no damages for the stgranted growth of appellee. Evidence on that subject was offered on the trial, and the court permitted the declaration to be amended to include such item after the verdict was rendered. There was no error in permitting the amendment to be made after verdict.

The fifth instruction on behalf of appellee told the jury that if they believed from the evidence that the injuries complained of were caused by the negligence of the servants of defendant in the course of their employment as such servants, as charged in the declaration, and that the plaintiff, himself, was in the exercise of due care and caution to avoid such injury then in such state of the proof the defendant company would be liable in this action. The seventh instruction told the jury that if they believed from the evidence that the defendant was guilty, and that the plaintiff had sustained permanent injuries as alleged in the declaration, that such fact might be taken into consideration in determining the amount of damages as a result of said alleged injuries. The objection to the fifth instruction is that ~~ix~~ its conclusion amounts to a directed verdict; that it refers the jury to the declaration to determine what the issues were, entirely ignores the defense that the alleged dropping of the cross-arm was not the proximate cause of the injury, and that this defense was not negative in either count of the declaration.

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The principal objection, however, urged against both instructions is that they refer to the counts of the declaration. The question of instructions referring to the counts of the declaration has been before the courts on many occasions. The rule with reference thereto is laid down in *Bernier vs. The Illinois Central Railroad Co.*, 296 Ill. 472. Many of the earlier cases are reviewed in *Krieger vs. Aurora, Elgin & Chicago Railroad Co.*, 242 Ill. 544, and in *McFarlane vs. Chicago City Railroad Co.*, 288 Ill. 484. It has not generally been held, however, that instructions of this kind constitute reversible error except in certain cases where a verdict was directed.

One of the reasons why an instruction of this kind should not be given is that the jury should not be left to determine for themselves what the issues are. In the case at bar, even though the instructions should be held to be directory, they did not constitute reversible error for the reason that other instructions given told the jury exactly what the issues were so the jury could not be misled. The eighth instruction on behalf of appellant told the jury that in each count of the declaration it was alleged that the defendant permitted said cross-arm to drop; that the allegation in each count was material and if not proven by the weight of the evidence, they should find the defendant not guilty. The twelfth instruction on behalf of the appellant told the jury that unless the plaintiff proved by a preponderance of the evidence the following propositions that they should find the defendant not guilty. First, that the plaintiff was not guilty of negligence that concurred with the alleged negligence of the defendant in producing the injury. Second, that the defendant was guilty of negligence in dropping the cross-arm in question. Third, that such negligence was the proximate cause of the injury. Other instructions covered almost every feature of the case and we do not think there was any injury in the fifth and seventh instructions given.

The substance of the first and second refused instructions on behalf of appellant was covered in almost every material respect by the fifth, eighth, eleventh and twelfth instructions given on behalf of appellant, and also by the second modified instruction given on behalf of appellant. The third refused instruction on behalf of appellant told the jury that they had no right to disregard the testimony of impeached witnesses sworn on behalf of the appellant simply because any such witnesses were in the employ of appellant. In *Carneghi vs. Gerlach*, 208 Ill. App. 340, an instruction almost in the identical language of the third instruction refused was before this court and complaint was made that it was improperly refused, and on page 349 this court said:- "The instruction is of doubtful propriety, and we are of the opinion that there was no error in the refusal of the instruction, since the court gave to the jury instruction "G", which directed the attention of the jury to the proper and approved tests, which apply to all of the witnesses." The third instruction on behalf of the appellee and the seventh on behalf of appellant told the jury that tests should be applied in determining the weight to be given to the testimony of any and all of the witnesses. There was no reversible error in the refusal to give the three instructions offered by appellant.

J. H. Colean, a witness on behalf of appellant, testified that he was the driver of the truck used by appellant in the work at the time of the accident; that he was in the truck about fifty yards east of the gap, and was facing east; that he did not see the team drive up to the gap, or did not see anything that took place. He testified to nothing material in the case. Upon cross-examination, counsel for appellee attempted to lay the foundation for an impeaching question with reference to a conversation which the witness had with certain men in a blacksmith shop in which the witness was alleged to have said that there was a cross-arm thrown down by a man on the pole, but the man on

the pole did not know that the team was going through; that there was no use telling a damed lie about it - they dropped a cross-arm, and the team ran away, Objection was made to these questions which were sustained. The witness was not permitted to answer the questions. No attempt was made to prove by the witnesses the conversation based on the impeaching questions. These questions, attempting to lay the foundation for impeachment, were not proper. Counsel for appellant certainly knew that this testimony was improper and its only effect was to prejudice the jury. We have already reversed this case once because of error committed upon the trial and we are very reluctant to reverse it a second time because of this incident but we feel that it is our duty to do so. The appellant was compelled to rely for its testimony upon its employees and the effect of the action of counsel for appellee was to destroy the weight of the testimony of all of the witnesses for appellant. While it is true the objections were sustained, notwithstanding that fact, the jury may have been of the opinion that had the court permitted the witness to answer the questions, the answers would have been in the affirmative thereby admitting the case of the appellee and condemning the witnesses for appellant. The conduct of counsel, not only gave the jury an opportunity to become prejudiced against appellant, but it left the record in such a condition that the jury were inclined, not only to find for the appellee, but it would have the further effect of prejudicing the minds of the jury so they would feel like increasing the damages claimed.

The judgment will be reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 18th day of
Sept in the year of our Lord one thousand
nine hundred and twenty-six

Justus L. Johnson
Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

242 I.A. 651

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 25 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



The Ambia School of Hickory
Grove Township, of Benton
County, in the State of In-
diana,

Appellant,

v.

The Non-High School District
of Iroquois County, Illinois,

Appellee.

Appeal from the
Circuit Court of
Iroquois County.

242 I.A. 651

Jones, J.

Appellant is a school district in Indiana, and appellee is a non-high school district in Illinois. Appellant began^a suit in assumpsit in the circuit court of Iroquois County against appellee to recover about \$3500 alleged to be due appellant for tuition of pupils living in the non-high school district, and who it is claimed attended the high school of appellant. After appellant had filed its suit in assumpsit, it also exhibited its bill in chancery, wherein it was alleged that the suit in assumpsit was pending and that adequate relief cannot be obtained therein, because appellee, combining and confederating with certain other persons to appellant unknown, to injure and defraud appellant, procured a decision in the Supreme Court, in the case of People v. C. & N.W. Ry. Co. 286 Ill. 384, to which cause appellant was not a party. It was further alleged that the Supreme Court held in said case that an Illinois school district cannot raise money by taxation to pay the tuition of children attending schools located beyond the boundaries of this state; that the state of Illinois, its school authorities and judicial department are estopped to deny the validity of the alleged contract under which the services in this behalf are claimed to have^{been} rendered; and that the said decision is in contra-vention of the Federal Constitution. The bill prays that

U.S. DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

179-1543

appellee may be estopped to assert in any action brought against it, the invalidity of the alleged contract for tuition and for an injunction. Appellee answered the bill and upon the hearing, the bill was dismissed for want of equity. An appeal was taken to the Supreme Court of this state on the ground that a constitutional question was involved. The Supreme Court held adversely to such contention, and transferred the cause to this court. In the oral argument in this court counsel for appellant insisted that this court does not have jurisdiction of the cause and that a constitutional question is involved. The decision of the Supreme Court transferring this cause to this court definitely and conclusively determines that no constitutional question is involved and that this court has ~~juris~~ jurisdiction of the cause.

In the case of The People v. C. & N. W. Ry. Co. supra, the issue was as to the constitutionality of sections 93, 94 and 96 of the School Law of 1917. On page 398 it is said that: "It is also objected that non-high school pupils are privileged by section 96 to attend schools in other states and that their tuition must be paid from the non-high school tax. We do not think so. As we have seen, our School Law is for the purpose of providing a general system of free schools throughout the state. The right to the transfer of pupils from one district to another is a right ~~in~~ of transfer within such system and consequently within the territory ~~covering~~ covered by that system. It follows that section 96 does not give the right to a pupil from a non-high school district to choose a high school without the state." It is claimed by appellant that this holding is obiter dictum. We do not so view it. It was urged in that case that section 16 was unconstitutional because it allowed non-high school pupils to choose ~~in~~ ^{schools} other states, and the Supreme Court held there was no such privilege granted by that section. The decision was later approved by the Supreme Court in People v. C. & N.W. Ry. Co. 287 Ill. 92. These decisions are conclusive and binding upon this court.

3.

There are several other reasons why the decree of the circuit court should be affirmed. There is nothing stated in the bill which makes the action cognizable by a court of equity. The cases cited by appellant to the effect that a suit in equity may be sustained when the remedy at law is not plain, adequate and complete, or which involves features which can be determined only by a court of equity, are not in point. There is no reason shown why all the rights of the parties cannot be settled and determined in an action at law. The testimony shows there was no contractual relation existing between appellant and appellee with reference to the tuition upon which the alleged right of recovery is based. The burden of proof is upon a party who brings a suit upon an alleged contract, to establish the same either as an express or an implied contract, and this appellant has failed to do.

For the reasons indicated the decree of the circuit court is affirmed.

Decree affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 25th day of Sept. in the year of our Lord one thousand nine hundred and twenty-six,

Justus L. Johnson
Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

242 I.A. 652

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 25 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

School Directors of School
District No. 103 in Mercer
County, Illinois, et al,
Appellants,

v.

Appeal from the
Circuit Court of
Mercer County.

Board of Education of Com-
munity Consolidated School
District No. 115 in Mercer
County, Illinois, et al,
Appellees,

242 I.A. 652

Jones, J:

School districts Nos. 103, 108, 113, 114 and 115 in Mercer County, Illinois, were consolidated into Community Consolidated School District No. 115 and taxes were levied and collected both for building purposes and school purposes. In the territory comprising former districts Nos. 103, 108 and 113 elections were held to disconnect the same from the consolidated district and the required number of votes was cast in favor thereof in each of said districts, and they were disconnected on December 13, 1923. In the territory comprising former district No. 114, a similar election was held and it was detached on February 9, 1925, thus leaving in the consolidated district only the territory comprising former school district No. 115. After the detachments became complete, each of the former common school districts was reorganized into a common school district and assigned the same number which it held prior to the consolidation. Boards of education or school directors were elected in each of the four districts, which had been detached, and they made demand upon the board of education of the Community Consolidated School District and the township treasurer having charge of the funds of the Community Consolidated School District, for their respective shares of the taxes and property remaining in the hands of such treasurer at the time of such detachment. Their request was denied and they filed a bill in the circuit court of Mercer County for an accounting and distribution

§ 543

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of such funds and property. A demurrer was sustained to the bill and it was dismissed for want of equity, and an appeal has been prosecuted to this court.

It is insisted by appellee that equity has no jurisdiction of a suit of this character, and that there is no provision in the School Act for the distribution of the funds in question. The same question involved in this case, namely, the right of a district which has withdrawn from a Community Consolidated School District, to a portion of the funds in the hands of the treasurer, was before this court in *Ketcham v. School Trustees, et al*, appellees, Gen. No. 7551, opinion filed April 5th, 1926, but not reported, and in *School Directors of District No. 89, County of Winnebago, et al v. Trustees of Schools of Township No. 26, et al*, 238 Ill. App. 642. We held that a district so withdrawing was entitled to its share of the funds and property in the hands of the treasurer at the time of the withdrawal, and that mandamus would lie against the officers of the Community Consolidated School District and the treasurer to compel them to pay. The only difference between those two cases and the case at bar is that they were proceedings for ~~mandamus~~ mandamus while in this case, a bill in equity was filed for an accounting and distribution. We think the allegations of the bill are sufficient to give a court of equity jurisdiction for the reason that it is alleged that the moneys collected from taxes were not kept separate and distinct from other school funds and that the building fund was mingled with the fund for general school purposes; that warrants were issued against such co-mingled funds without reference to the year in which the taxes were levied and collected and without reference to the fund from which the same should be paid; and that without an accounting there is no way of telling how much money is due or remaining in each fund. The bill also alleges that the board of education of the Community Consolidated School District threatens to and is using such funds to carry on the school in former common school district No. 115.

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Equity may assume jurisdiction, even though there is a remedy at law, if the remedy in equity is more adequate and complete.

(Warfield@Howell Co. v. Williamson 253 Ill. 487.) When taxes have been collected, equity will generally interfere to prevent misappropriation of the funds. (People v. Hassler 262 Ill. 133; People v. Bates, supra; People v. Scott 300 Ill. 290.)

The circuit court improperly sustained the demurrer and the decree will be reversed and the cause remanded with directions to overrule the demurrer and for other proceedings consistent with the views herein expressed.

Reversed and remanded
with directions.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 25th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty six,

Justus L. Johnson
Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

242 I.A. 652

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 25 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

C. A. Weigner,
Plaintiff in Error,

v.

Twin City Company, a Corporation,
Defendant in Error,

Error to Circuit
Court of Peoria
County.

242 I.A. 652

Jones, J:

Plaintiff in error brought suit in the circuit court of Peoria County against defendant in error to recover damages for an alleged breach of contract. The cause was tried before a jury which resulted in a verdict and judgment for defendant in error. This cause comes to this court by writ of error.

Defendant in error is a Minnesota corporation, dealing in tractors and road-building machinery. It had a branch office in Peoria, at which C. N. Gardner was manager and Benzil Foutch was assistant manager. Plaintiff in error, Weigner, was engaged in buying, selling and re-building tractors and other heavy machinery at Donellson, Iowa. In the early part of April, 1924, while in the office of defendant in error at Peoria, he learned from Gardner that the Twin City Company was negotiating with Scotland Township in McDonough County, Illinois, to sell it a Twin City tractor, and would likely take in on the deal and have for sale a used Aultman-Taylor tractor then owned by the township. Gardner informed Weigner that his company must have a sale for the Aultman-Taylor tractor before it could sell the new one. Weigner indicated that he might find a customer for it. On April 15th, he went with V. T. Peterson, an employee of defendant in error, to the place where the tractor was located near Macomb, and examined it. At that time it was agreed that Weigner should take the tractor at \$1375. He refused to sign an order for it then, but it was agreed that an order would be sent by defendant in error's Peoria office to him for signature. The next day Peterson reported the transaction to Gardner, who

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called defendant in error at Donellson, Iowa, by phone, and verified Peterson's report. Following this conversation, Gardner instructed Foutch, his assistant manager, to prepare and forward an order to Weigner. Foutch prepared duplicate printed forms and mailed them the same day. They were received by Weigner at Donellson, Iowa, the next day, April 17th. Before sending the order forss, Foutch signed his name on them in the lower left hand corner, on a dotted line extending from the printed word "witness." Weigner testified that he signed both copies of the order and mailed one copy, properly stamped, to defendant in error on April 17th, the same day he received them. The testimony shows that his signed order was not received by defendant in error until April 23rd. Weigner claims that he resold the tractor to one William Seyb on April 19th for \$3,000 taking in trade an engine at \$500; the remaining \$2500 was ^{to be} paid in cash. On April 23rd Gardner wrote Weigner that they had fully expected to receive his order the previous Saturday but did not receive it on Monday, so that they lost their sale to the township.

It appears that Peterson took an order from the township for the new Twin City Tractor on the same day that Weigner examined the old tractor, and that the old tractor was afterward sold to another party about April 22nd for \$1375. Gardner in explanation of his letter written April 23rd, testified that at the time he wrote the letter neither the new customer's order for the old tractor nor the township's order had been accepted; that because they did not hear from defendant in error, they did not put the pending contract through, but entered into a new contract with the township. The tractor which was sold to the township was not delivered until May 6th. Weigner demanded that defendant in error deliver the tractor to him. Gardner informed him that his order had never been accepted on account of his delay and that the old tractor had been sold.

Both parties in their briefs treat the order as an offer by defendant in error to be accepted by plaintiff in error and the first question is whether or not there was an acceptance

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and contract between them within the statute of frauds. It is the contention of defendant in error that as no time was specified within which the order must be executed and returned, plaintiff in error was required to execute and return it within a reasonable time after it was sent to him; that the order was sent to him on April 16th, received by him the next day, but not returned to defendant in error for about a week and not received by it until April 23rd, and that this constituted an unreasonable delay. It is argued that Donellson, Iowa, is between 127 and 130 miles from Peoria and that the contracts mailed by defendant in error to plaintiff in error from Peoria to Donellson, Iowa, reached him the next day and that the inference is that he did not mail the contract back when he said he did. It is also pointed out that he made two different statements as to the mailing of the signed order:- one that it was put in with the regular day's mail, and the other, that he personally took it to the postoffice about two o'clock in the afternoon and handed it to one of the postoffice employees. Gardner's ~~testimony~~ testimony that the signed contract was not received until April 23rd is supported by the testimony of his stenographer who received the mail and stamped the date of its receipt on the contract. The re-sale to William Seyb was not made until April 19th, and because the refusal of plaintiff in error to sign the contract offered by Peterson, it is urged that the signed contract was not mailed to defendant in error until weigner had assured himself of a sale.

It is unquestionably the law that a contract is completed by depositing a signed acceptance of an offer in the mail properly stamped and addressed, if done within the time specified in the offer, or if no time is specified, within a reasonable time after receipt of the offer. An offer from one party to another is open for a reasonable time only and unless accepted within a reasonable time, the offerer is not bound by it. (Koeffler v. Davidson 66 Ill. App. 542; 6 R.C.L. Contracts 610.) Where an offer contains

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no statement of time for which it will continue, it is construed as for a reasonable time only and what, under such circumstances, is a reasonable time, depends upon the particular case and the circumstances surrounding it. (Wrisley Co. v. Mathieson Alkali Works 107 Ill. App. 279.) Where an offer is made by mail, either stipulating for, or from the nature of the business having the right to expect, an answer by return of post, the offer can only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be sent by return of post. (McClay v. Harvey 90 Ill. 525.) Did plaintiff in error delay accepting defendant in error's offer and was such delay so unreasonable as to justify defendant in error in selling the tractor to someone else? These questions were questions of fact for the jury to determine. We have nothing before us but the printed record and briefs in the case. But the jury saw and heard the witnesses; were able to observe their demeanor and deportment and to better judge their credibility than we are. Under such circumstances this court would not be justified in reversing the judgment on the ground that the verdict of the jury was manifestly against the weight of the evidence.

The parties do not agree as to what is the correct measure of damages. Under one count of the declaration plaintiff in error sought to recover damages based upon the difference between the contract price and the fair cash market value of the tractor. In the other count he sought to recover under paragraph 2 of Sec. 67 of the Sales Act, which provides that the measure of damages is the loss directly and naturally resulting in the ordinary course of events from the alleged breach of contract. Sec. 70 of the Sales Act provides that nothing in the act shall affect the right of the buyer or seller to recover special damages in any case where by law, special damages may be recoverable. As we view the case, the

serious question is whether or not there was sufficient evidence on which to base any claim for damages, except the difference between the contract price and the market price. In *Black Diamond Fuel Co. v. Illinois Fuel & Phosphate Co.* 219 Ill. App. 150, it is held that on breach of contract by a wholesale coal dealer to supply coal to a retailer, the latter is entitled to recover for the loss of profits on coal which the seller failed to deliver according to the contract, if he was unable by the exercise of reasonable diligence, after breach of contract, to procure coal elsewhere to supply his customers. We think the court properly instructed the jury as to the measure of damages.

Complaint is made of the 3rd instruction given for defendant in error, which told the jury that before the plaintiff could recover he must prove that he entered into a valid and binding contract and that all the terms were definitely settled and agreed upon. It is urged that this instruction was erroneous and that it was the duty of the court to tell the jury what the contract was and if the contract had not been entered into or its terms had not been agreed upon, that was a question for the court to determine. Plaintiff in error is under a misapprehension for the reason that the question as to whether or not the contract was in fact entered into was a question for the jury and the interpretation of the contract after it had been entered into was a question for the court.

Complaint is made that the court refused to admit certain evidence on behalf of plaintiff in error and unduly restricted the cross examination of defendant in error's witnesses. Considerable latitude should be allowed in cross-examining a witness but we are of the opinion that the cross-examination was not unduly restricted in this case by the trial court. Plaintiff in error's exhibit 1 should have been admitted in evidence, but its exclusion is insufficient to constitute reversible error.

Defendant in error should have been limited in its evidence to the matters set out in the affidavit of defense, but plaintiff

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in error failed to object to any evidence on that ground and is therefore estopped to set up as error in this court what he failed to object to on the trial of the cause. (Calvert v. Block & Kuhl Co. 238 Ill. App. 636.)

For the reasons above set forth the judgment of the circuit court should be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT }ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 25th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

242 I.A. 652

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 25 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Willard Martin Jones,
Plaintiff in Error,

vs.

Error to Circuit
Court of Lee
County.

North America Benefit Corporation
of Springfield, Illinois,
Defendant in Error,

242 1. A. 652

Jones, J:

This suit was instituted in the circuit court of Lee County by Willard Martin Jones, against North America Benefit Corporation of Springfield, Illinois, to recover on a policy of insurance for \$1000, upon the life of Emma Jane Jones, mother of plaintiff in error. Defendant in error is a mutual insurance company, organized under the laws of Illinois. It is not a fraternal order and has no lodges or local branches, but procures its business through soliciting agents. It does not require applicants to submit to a medical examination, but it does require a written application to be made, containing questions and answers relative to the applicant's health, medical attention, previous diseases, etc. The policy in question was issued November 18, 1924 and the assured died May 2, 1925. Proofs of death which were sent in were retained by the company, but it denied liability and sent plaintiff in error checks for \$9 on account of money paid by him on monthly premiums. He did not cash the checks but brought this suit. Defendant in error filed the general issue and pleas of tender of \$9. A jury was waived and the cause was tried by the court. Upon the hearing judgment was rendered against defendant in error for \$9 and costs of suit. From that judgment this cause comes to this court by writ of error.

Defendant in error's denial of liability is based on its claim that the assured's statements in the application for the policy were not true in that she stated she was in good health was not a cripple and had no disease, when in truth and in fact

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she was a cripple, was not in good health and had paralysis. The application contained the following questions: "Are you a cripple?# Have you any of the following diseases: kidney, liver, heart, rupture, pellagra, lung, stomach, bladder, dropsy, asthma, cancer or tumor, rheumatism, bowel trouble, female trouble, any other diseases?" Each of them was separately asked and was answered "No". The following questions and answers also appear. "Have you received medical attention within the last two years? Yes. If so, give particulars. Grip--colds. Are you in good and vigorous health? Yes". The application then stated that the applicant is strong and in good mental and physical condition and that the statements as to her occupation, age and physical condition are full, true and correct; and the statements concerning age and condition of health are warranties, and in case of fraud, the liability of the company shall not exceed the amount paid in by the ~~applicant~~ applicant.

It appears from the evidence that Mrs. Jones had a cerebral hemorrhage about 15 years prior to her death, resulting in partial paralysis of her left side. She had a recurrence of the same trouble in November, 1923. She walked with a cane, and in 1918 she had tripped and broken her arm. The fracture was splinted but reduced. The doctor who attended her at that time testified that it was impracticable to give her an aneesthetic on account of a heart lesion.

Florence Phelps was an agent of the defendant company and had been acquainted with the assured for 8 or 10 years and had known her quite well for 4 or 5 years, x visiting her home often. Mrs. Phelps testified that she had been instructed by the district agent of defendant in error that she could write people who had been partially paralyzed and who had overcome such ailments and were

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up and around. The district agent testified and denied he ever told her such a thing. But whatever may be the truth as to such alleged conversation, Mrs. Phelps approached Mrs. Jones, solicited her to take the insurance, and was advised by Mrs. Jones that she could not take it because it was financially impossible for her to carry it. Then Mrs. Phelps went to plaintiff in error and told him she would like to insure his mother. He replied that his mother was partially paralyzed and lame and that he did not think she could pass an examination. Mrs. Phelps then told him the defendant was not an insurance company, but a burial association and required no medical examination, and that the general agent, Fuller, had told her she could write partially paralyzed persons. He replied that if his mother wished to take the insurance he would pay all assessments and dues if he was made the beneficiary. He also testified that he understood it was a burial association. Mrs. Phelps admitted that she knew the condition of Mrs. Jones, knew she was paralyzed and lame, and knew she had trouble with her hand and had been treated by doctors. With this knowledge she took the application and delivered the policy. The answers to the questions in the application were written by Mrs. Jones and Mrs. Phelps testified that the general agent had instructed her to have applicants write such answers. The only question in this case is whether the misstatements contained in the application constitute a valid defense upon which the company can rely under the facts and circumstances disclosed in the record. When Mrs. Phelps took the application she knew Mrs. Jones' physical condition, her diseases and her ailments. In addition to that, she was told by plaintiff in error that his mother had paralysis and was lame, and that he did not think she could pass an examination. It is well settled in Illinois that notice to the agent at the time of the application for the insurance, of facts material to the risk, is notice to the insurer and will prevent it from insisting upon a forfeiture for causes within the knowledge of the agent. (Storment v. Hartford

Ins. Co. 215 Ill. App. 287; Phenix Ins. Co. v. Hart 149 Ill. 513; Woodlawn Farm Co. v. F. & B.L. Ins. Co. 227 Ill. App. 577; Providence Sav. Co. v. Cannon 201 Ill. 260.) The cases are not uniform throughout the country regarding when notice to or knowledge of the agent or representations by him will bind the company. In this state however the decisions are uniform. (Home Ins. Co. v. Mendenhall 164 Ill. 458; Phenix Ins. Co. v. Hart, supra; Scott v. Bankers' Auto Ins. Association 224 Ill. App. 606.) To permit a recovery on an insurance policy, notwithstanding the falsity of the answers by the insured to questions contained in the application, it is sufficient if the agent of the insurance company knew the falsity of such answers. (Globe Mutual Life Ins. Asso. v. Ahern 191 Ill. 167.) An insurance company cannot say that it has been deceived by answers which it knew were false when they were made.

In the cases cited by defendant in error, the misrepresentations were made by the insured without any knowledge of the real facts by the company or its agent. But where the company knew the real fact, the rule is as we have stated it. In Pegram v. Mutual Protective League 159 Ill. App. 214, the insured had been suspended for non payment of assessments. He was taken sick and afterwards died. During his illness he was reinstated. He signed an application for reinstatement, which, among other things, ~~verified~~ certified that he was in good physical and mental health and was then and had been ever since his suspension free from any sickness whatever. It also contained an agreement that if the statement was found to be a misrepresentation of his present physical condition his benefit certificate should become null and void and of no binding force whatever. The local secretary of the order furnished the reinstatement blank, but denied knowledge of the insured's illness. However, the appellate court of the Third District held the evidence tended to show he did know ~~of~~ of such illness and upon the ground that such knowledge was a waiver by

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the company, upheld the judgment against it. We think that case is decisive of the case at bar. The rule is not changed simply because the applicant wrote her own answers. One who can read and write is presumed to know the contents of the instrument he signs and will be bound thereby, whether written by himself or another. It is true that there is an exception to the rule recognized by the courts of this state, where there is fraud and collusion by the agent and the assured. But there is no proof in this record sufficient to establish such fraud and collusion as would constitute a defense to the actions. Neither the assured nor the beneficiary sought the insurance. On the contrary the assured declined it because she was unable to pay the assessments. The beneficiary frankly told the agent of his mother's physical condition and that he did not believe she could pass an examination. He was assured by the agent that she had authority to write partially paralyzed people and that the company was ~~not~~ not an insurance company but a burial association. The word "paralysis" does not appear among the list of diseases named in the application and although the assured answered that she then had no other disease than those named, it is quite possible that she did not attach much importance to the fact that she had formerly had two cerebral hemorrhages. It is questionable if the average person, unskilled in medical science, knows anything of the pathology of such cases. While the evidence shows that she had a heart lesion, there is no testimony to show she knew it. She was lame and answered she was not a cripple, but we think this is not such evidence of fraud as to avoid the contract.

Defendant in error claims that because plaintiff in error had bought a home from the husband of Mrs. Phelps on installments, that fact was proof of fraud and collusion in that some financial benefit might be expected to accrue to Mrs. Phelps or her family, in case plaintiff in error succeeded in this case. Fraud will not

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be presumed, but must be proved by such clear and convincing evidence that the mind is well satisfied that the charge is true. The burden of proving fraud rested upon defendant in error. All transactions are presumed to be fair and honest until the contrary is proved. (Carter v. Carter 283 Ill. 324.) Fraud will not be presumed but must be proved like any other fact by clear and convincing evidence. Something more than mere suspicion is required to prove it. If the motives and designs of the parties charged with fraud or collusion may be traced to an honest and legitimate course equally as to a corrupt one, the former explanation ought to be preferred. (McKenna v. Mickelberry 242 Ill. 117.) There is no convincing proof in this record that the agent acted fraudulently. From the admissions of the district agent of the loose way in which other applications were taken and approved, it is not improbable that Mrs. Phelps was told that she might write people who had been partially paralyzed, or at any rate that she so understood her authority.

Defendant in error also claims that because the assured wrote the answers in her application, the agent had nothing to do with passing upon the desirability of the insurance, and consequently could not bind the company. The agent answered in writing the following questions on the application, "State exactly what kind of a risk you consider applicant." (A) "Good." "Do you recommend that we issue a certificate? (A) "Yes." This evidence shows that the agent did have something to do with passing upon the ^{disability} ~~desirability~~ of the risk. The case of Carlson v. Metropolitan Life Ins. Co. 221 Ill. App. 354 cited by defendant in error is not in point. In that case the soliciting agents were not called upon to know anything of the physical condition of the applicant, but all inquiries in that regard were made by the medical examiner.

Our conclusion is that the agent of the defendant company had full knowledge at the time the application was written of the

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facts material to the risk; that she knew the answers written by the defendant were not true, and that the defendant company has not proved that the policy was issued as a result of fraud and collusion. The judgment of the circuit court was wrong and the cause will be reversed and remanded.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 25th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

242 I.A. 652

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 25 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Ruth E. Stattler,
Appellee,

vs.

Wilbur P. Stattler,
Appellant,

Gen. No. 7632

Appeal from the
Circuit Court of
Carroll County

Ruth E. Stattler,
Defendant in Error,

vs.

Wilbur P. Stattler,
Plaintiff in Error,

Gen. No. 7628

Error to Circuit
Court of Carroll
County.

Jones J:

242 I.A. 652

On May 7, 1924, Ruth E. Stattler, appellee in Gen. No. 7632 and defendant in error in Gen. No. 7628, filed her bill for divorce in the circuit court of Carroll County alleging that her husband Wilbur P. Stattler, on or about May 1, 1923, at Chicago, Illinois, committed adultery with one Florence Isenberger; that at divers other times and places since said marriage to the complainant unknown he committed adultery with said Florence Isenberger; and that he and Florence Isenberger traveled and lived together in various places in the southern states, particularly at New Orleans, during a period of two years next preceding the filing of the bill. On November 24th, 1924, the defendant filed an answer denying the charges. A petition for alimony pendente lite and solicitor's fees was filed. On December 20, 1924, the attorney who filed the defendant's answer withdrew as his solicitor by leave of the court. The petition for alimony was afterward heard on the same day and an order entered requiring the defendant to make certain payments within the time specified in the order. On March 9, 1925, the cause was heard upon the bill and answer. The complainant and three witnesses were examined and a decree for divorce entered. The defendant was ordered to pay the complainant \$50 a month for her support and \$15 a month for the support of their infant child until the further order of the court, together with the sum of \$125 for her solicitor's fee. During the same term at which this

Walter E. Stettin,
Attorney

vs.

William E. Stettin,
Defendant

Walter E. Stettin,
Attorney

vs.

William E. Stettin,
Defendant

James J.

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On May 7, 1934, Walter E. Stettin, in and to the
and defendant in error in No. 1030, 1934, 1935, and 1936
in the circuit court of the United States for the District of
Walter E. Stettin, of the County of Cook, State of Illinois, the
admitted liability for the alleged negligence of the defendant
other than the time and place and manner of the commission
unknown to the plaintiff and the defendant, and the
that he as the defendant intended to cause the
various places in the County of Cook, State of Illinois, and
during a period of the year 1934, 1935, 1936, and 1937.
On November 24th, 1934, the defendant filed in court a motion
order. A writ of habeas corpus was granted to the defendant
was filed. On December 22, 1934, the defendant filed in court
defendant's answer. The answer was filed in court on December 22, 1934.
The petition for writ of habeas corpus was granted to the defendant
an order entered requiring the defendant to show cause why he
within the time specified in the order. On December 22, 1934, the
was heard from the bill and answer. The court entered an order
witnesses were examined and a decree for costs entered. The
defendant was ordered to pay the complainant's costs and to
support and his share for the support of his family and
until the further order of the court, and to pay the costs
for her solicitor's fee. During the year 1934, 1935, 1936, and 1937

decree was entered, the defendant filed his petition to get aside the decree, alleging that upon his being served with summons he employed an attorney to represent him and left Carroll County temporarily believing his said attorney would keep him advised and take proper proceedings for his defense; that his attorney neglected and omitted to file any answer or appear or defend him in any way and that on that account he was defaulted and the decree obtained by default; that had he known his attorney would not make the proper defense he would have employed other counsel. The petition denies he committed adultery and alleges that if the cause should be heard again he will be able to produce witnesses to refute the charges. He afterwards filed a supplemental affidavit admitting that an answer for him had been filed and that a hearing was had on the petition for alimony; but he alleged that he did not know his attorney had withdrawn from the case until about three months thereafter and that he was not in court during the hearing on the petition for alimony. The affidavit further alleged that he did not know the hearing on the bill for divorce was set for March 9th and believed his attorney was guarding his interests; and that as soon as he was able to consult and retain another attorney he filed his petition to vacate the decree. The petition to vacate the decree for divorce was denied and an appeal was taken to this court from that order. The defendant also sued out a writ of error to review the proceedings in reference to the allowance of alimony and both causes have been consolidated in this court.

Two questions are presented by this record--whether the testimony produced at the hearing in the proceeding for divorce was sufficient to entitle the complainant to a decree, and whether the chancellor erred in refusing to set aside and vacate the decree. The principal ground relied upon for reversal of the decree is that the testimony is so indefinite that the court was not justified in entering it. The specific charge of adultery in Chicago on May 1st, 1923, was

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not proven. Were it not for the fact that the bill further charges that the defendant committed adultery with Florence Isenberger at divers other times and places since said marriage unknown to the complainant, the decree could not be sustained. It is argued by appellant and plaintiff in error that the testimony does not show whether his consorting with the woman named was before or after the marriage. None of the witnesses who testified on the part of the complainant fixed any certain time when they saw the defendant and Florence Isenberger together. Appellee and defendant in error testified that she left her husband because for the year before, he was entirely indifferent to her and that she knew of his relations Florence Isenberger. In view of the length of time the parties were married and the fact that it is a matter of common knowledge that charges of adultery in divorce proceedings relate only to the time of coverture, we consider this contention of little weight.

It is claimed that on account of the discrepancy in the names the proof does not meet the allegations of the bill. The names Eisenberger, Eisenbeiner and Eisenbeise are each used in the record as the name of the woman with whom it is charged appellant consorted. The name is rather unusual and such names are frequently miscalled. But however the name was pronounced, it was prefixed with the name Florence and we conclude that the witnesses had in mind the same women. Appellee testified that appellant acknowledged to her that he had been with Florence Eisenberger at different times and had brought her from Chicago to Clinton in a car; also that he took his meals at a restaurant in New Orleans one winter where she was a waitress. Her testimony in this respect was corroborated by another witness. The testimony shows that he was with her frequently; that his car was often seen standing in front of the place where she resided, in the daytime and at night; that at times she would leave her home and shortly thereafter the defendant would follow in his car and when he overtook her, she would get into it. It also shows that

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an automobile which she drove and claimed, was levied on as his property and so adjudicated.

It has long been the rule that adultery need not be shown by direct proof, but it may be proven by such facts and circumstances as by fair inference would raise in the mind of a reasonable and just man the presumption of co-habitation and unlawful intimacy. (Bast v. Bast 82 Ill. 584; Stiles v. Stiles 167 id. 576; Zimmerman v. Zimmerman 242 id. 552.) The chancellor saw the witnesses and heard their testimony and was in a position to judge of their credibility. Great weight should be attached to his findings. (Beall v. Dingman 227 Ill. 294.) Even if we were in doubt as to the correctness of the conclusions reached by the trial court as to the facts established by the evidence, we would not be justified in setting aside the decree, unless, from a review of the record, we are able to say the decree is clearly and palpably erroneous. (Van der Aa v. Van Drunen 208 Ill. 108.)

We cannot say that the chancellor was not justified in entering the decree for divorce or that the amount of alimony was unwarranted or excessive. The supplemental affidavit of plaintiff in error and appellant admits the hearing on the petition for alimony was duly had. The testimony shows his income to have been from \$4,000 to \$6,000 a year and there is no allegation in his petition or affidavit filed in support thereof that this is not true. Under the decree the alimony is to continue until the further order of the court, and if plaintiff in error so desires, there is nothing to prevent him from applying to the trial court at any time for a modification.

Plaintiff in error claims that he did not know that his attorney had withdrawn as his counsel until after the decree for divorce was entered and that he was not present in court during the hearing on the petition for temporary alimony. The record shows that his attorney withdrew as his counsel and afterward on the same day the petition for alimony was heard. The order for temporary alimony recites that the complainant came by her counsel, and the

an automobile (Ford or Buick, not certain), and a light-colored overcoat.

It was dark when the witness saw the automobile.

At that time, he was walking on the sidewalk.

He is not certain of the make of the automobile.

He saw the automobile on the street.

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defendant in his own proper person. The verified suggestions to the court, filed by appellee and defendant in error to the petition to - set aside the decree for divorce, allege he was present in court and conferred with his counsel on that day, and this is not denied. He admits he was represented by the same counsel in other matters pending in the same court at that time and later when he filed his petition to set aside the decree for divorce. Appellant does not disclaim knowledge that the order for temporary alimony had been entered, yet, singularly, he contends that he had no communication with his former attorney about the divorce case during all that time. The petition to set aside the decree was addressed to the discretion of the court. (Prettyman v. Barnard 37 Ill. 105.) The chancellor did not abuse his discretion. The decree for divorce will be affirmed and the order denying the petition to set the same aside will be affirmed, and they are affirmed accordingly.

Decree affirmed and order denying
petition to vacate decree affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 25th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty six.

Justus L. Johnson
Clerk of the Appellate Court

Abstract 577a
AT A TERM OF THE APPELLATE COURT

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

242 I.A. 659

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 25 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Ernest F. Swab,
Appellee,

vs.

Charles W. Gettle,
Appellant,

Appeal from the
Circuit Court of
Whiteside County.

242 I.A. 653

Jones J:

This is an appeal from a decree of the circuit court of Whiteside County directing appellant, Charles W. Gettle, to deliver up to appellee, Ernest F. Swab, a certain note for \$4,000 and a mortgage securing it, executed by Louis F. Murray and wife, and to deliver up for cancellation, a certain other note for \$4,000, given by appellee and appellant to the Sterling National Bank. The decree further ordered that upon the delivery of the Murray note and mortgage and the cancellation of the other note, appellee should pay appellant one-half of the amount appellant had paid the bank on said last mentioned note, together with accrued interest thereon.

The firm of Reitzel Brothers was engaged in the produce and poultry business at Sterling, and about August 1922, became heavily indebted to the Sterling National Bank. The officials of the bank demanded immediate reduction of this indebtedness. Reitzel Brothers induced Swab to execute his note to the bank for \$4,000 dated September 25, 1922, due six months after date, with a view of borrowing that sum from the bank to relieve their financial situation. Mark Reitzel, one of the brothers, took the note to the bank, but the bank refused to accept it. Swab was the owner of the above mentioned Murray note for \$4,000. He endorsed the note and executed an assignment of the mortgage in blank, as collateral security for the note he had signed. The mortgage was a second mortgage and the bank declined to accept the collateral and so informed Reitzel Brothers', but neither the bank nor Reitzel Brothers

1. The first part of the report is a general introduction to the subject of the study.

2. The second part of the report is a detailed description of the methods used in the study.

3. The third part of the report is a discussion of the results of the study.

4. The fourth part of the report is a conclusion and a list of references.

5. The fifth part of the report is a list of appendices.

6. The sixth part of the report is a list of figures and tables.

7. The seventh part of the report is a list of footnotes.

8. The eighth part of the report is a list of references.

9. The ninth part of the report is a list of appendices.

10. The tenth part of the report is a list of figures and tables.

11. The eleventh part of the report is a list of footnotes.

12. The twelfth part of the report is a list of references.

13. The thirteenth part of the report is a list of appendices.

14. The fourteenth part of the report is a list of figures and tables.

15. The fifteenth part of the report is a list of footnotes.

16. The sixteenth part of the report is a list of references.

17. The seventeenth part of the report is a list of appendices.

18. The eighteenth part of the report is a list of figures and tables.

19. The nineteenth part of the report is a list of footnotes.

20. The twentieth part of the report is a list of references.

21. The twenty-first part of the report is a list of appendices.

22. The twenty-second part of the report is a list of figures and tables.

23. The twenty-third part of the report is a list of footnotes.

24. The twenty-fourth part of the report is a list of references.

25. The twenty-fifth part of the report is a list of appendices.

26. The twenty-sixth part of the report is a list of figures and tables.

27. The twenty-seventh part of the report is a list of footnotes.

28. The twenty-eighth part of the report is a list of references.

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communicated this fact to appellee and he did not know anything about it. Reitzel Brothers then got appellant to place his signature on the note signed by Swab without the latter's knowledge. In fact, he knew nothing about it until shortly before the note matured. When it became due both appellee and appellant executed a renewal note. This in turn became due and was again renewed by them. About the time the last renewal note matured, appellee learned that appellant was in possession of the Murray ~~note~~ note and mortgage, and that it had been turned over to him by the bank without appellee's knowledge or authority. Appellee refused to join in another renewal and the bank insisted upon payment of the note and appellant paid it by giving the bank his individual note which he later paid. Swab demanded of Gettle the Murray note and mortgage, but the latter refused to deliver them. Thereupon appellee filed his bill in equity seeking their recovery. In the bill as amended appellee offered to pay one-half of the amount which appellant had paid the bank and prayed for the return to him of the Murray note and mortgage.

The testimony shows that when the bank refused to take the Murray note and mortgage as collateral, one of the Reitzel Brothers took them and in a few days returned them and again left them at the bank. The president of the bank put them in an envelope which he marked with Gettle's name. They became misplaced and were not found until February 26, 1924. At that time Mr. Crawford, president of the bank, delivered them to Gettle. This was shortly before the second renewal note became due. Crawford admitted that he placed appellant's name on the envelope and delivered the papers to him without authority from anybody. He testified that the bank had declined to accept them as collateral but had accepted the note which appellant had signed; that in the meantime he saw appellant, who agreed to sign on account of the papers; and that they were left at the bank as his property. Appellee knew nothing of these

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transactions or conversations. Gettle testified that he talked with Frank Reitzel about signing the \$4,000 note but that in the first conversation no mention was made of the Murray mortgage. This was about two weeks before the note was signed. Later Reitzel told him they had the Murray mortgage. He made an investigation of the mortgage and its value after Reitzel, left, discussing it with Mr. Crawford. He further testified that he executed the original note to the bank a day or so later; that appellee's signature was then on the note; that at that time he saw the Murray mortgage; and that when he signed the note Mark Reitzel stated the Murray mortgage was to be left at the bank to secure the payment of the note appellant had signed.

Frank Reitzel testified that he, and not Mark Reitzel was present when appellant signed the note and that there was nothing said about leaving the Murray note and mortgage at the bank to secure the payment of the said note, and that he did not know of any agreement to turn over the Murray note and mortgage to appellant. About two months after the note to the bank was signed appellant went there and asked the president to get him the mortgage securing the note, but it could not be found. He notified appellee that the mortgage could not be found and they both went to the bank and inquired about it. Appellant claims that when the first note to the bank became due, and was renewed, he and appellee, with the president of the bank, Frank Reitzel and another man had a conference at the bank at which it was agreed that when the Murray mortgage was found it was to be used to pay off their note to the bank, and that appellant was to take the mortgage and take care of the \$4,000 note, and that appellee agreed to the same, Appellee denies this, and Frank Reitzel and Crawford testified that they did not remember such a conversation. Appellant had several conversations with appellee, but it does not appear that in any of them, he said that the Murray papers were to go to him.

The testimony shows that about two weeks before appellant signed the note he and Frank Reitzel agreed that appellant was to receive \$500 from the proceeds of a car of eggs for signing the note and that he had a similar conversation with Mark Reitzel. On the day he signed the note, he received from Reitzel Brothers a written agreement that in consideration of his signing the \$4,000 note to the bank, Reitzel Brothers were to purchase a car of November eggs @ 27 $\frac{1}{2}$ ¢ dozen, assume all interest and carrying charges; and guarantee appellant at least \$300 profit by January 1, 1922; that in case the market did not justify that profit by January 1st, to release appellant from the note by securing another signer and making a new note at the bank and to assume all interest on the \$4,000 note. Appellant drafted the agreement. In addition, the Reitzels gave him their note for \$4,000 which he later put in judgment. Mark Reitzel also testified that appellant asked him not to say anything to appellee about his signing the note. This, appellant disputed.

Sometime after appellant took judgment on the note of Reitzel Brothers, they went into bankruptcy. He knew the bank had not accepted the Murray note and mortgage as a collateral, because of his investigation and conversation with the president of the bank. He therefore had knowledge that the bank had no authority to turn the papers over to him. The \$4,000 note executed by appellee and taken to the bank, was an accommodation note. When appellant joined in the note, it still retained its character. The joint renewal of the note on two occasions obligated both to pay the bank. When appellant paid off the last renewal note he became entitled to receive from appellee one-half the amount of his payment. But he was never a bona fide holder of the Murray note and mortgage; and under the evidence he never

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had any title to them. He was not a surety for Swab, but a co-maker of an accomodation note. The Murray note and mortgage was never accented as collateral security to the accomodation note and of this fact Gettle had actual knowledge. He is in no position to urge that he was in possession of them as collateral, without notice of the limitations placed upon their use.

It is urged that appellee has a full and complete remedy at law. The general jurisdiction of courts of equity over matters of account, includes cases of contribution between co-sureties of co-makers and the jurisdiction assumed by courts of law on this subject in no manner affects their belonging to equity. (1 C.J. Accounts and Accounting Sec. 61; Connove v. Mill 76 Ill. 342; Northern Trust Co. v. Marsh 98 Ill. App. 596; Trego v. Estate of Cunningham 267 Ill. 367.) One surety may, without having actually paid the debt, bring a bill in equity to compel his co-surety to contribute with him to its payment. (Am. & Eng. Enc. of Law 2nd Ed. Vol. 7 p. 332; Hodgson v. Baldwin 65 Ill. 532.) The cause is clearly cognizable by a court of chancery.

It appears in evidence that the Murray mortgage has been renewed by the giving of a new mortgage. Previous to the hearing in this cause the chancellor entered an order appointing a receiver for the possession, renewal and collection of the Murray note and mortgage, but providing that in lieu of a receiver Gettle might be permitted to retain possession thereof upon his giving a bond in the sum of \$3,000.

From a careful consideration of all the facts in this case and the law applicable thereto we are of the opinion that appellee is liable to appellant for one-half the amount paid the bank by appellant together with interest thereon. Appellant must turn over ~~to~~ to appellee the original Murray note and mortgage or the renewals thereof or account therefor. A court of equity having acquired jurisdiction for one purpose may retain it for all purposes necessary to do complete justice between the parties and determine

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all their rights in the controversy. (Wehrheim v. Smith
226 Ill. 346; Risser v. Patton 232 id. 353.)

The decree of the circuit court is affirmed.

Decree affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 25th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty-six

Justus L. Johnson
Clerk of the Appellate Court

Abstract
5480a
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

242 I.A. 653

BE IT REMEMBERED, that afterwards, to-wit: On
OCT 1 - 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Abraham S. Berg and David Ansin,
co-partners, doing business as
Royal Textile Company,
Appellants,

vs.

Appeal from
City Court
of Aurora.

J. D. Annenberg and M. R. Patterson,
co-partners, doing business as
Annipatt Garment Company,
Appellees,

242 I.A. 653

Jones, J:

This cause was before this court at a former term under Gen. No. 7380. An opinion was filed therein on March 27, 1925 reversing and remanding the cause. At a subsequent trial before a jury in the city of Aurora, a verdict was returned in favor of appellees. Judgment was entered on the verdict and this appeal followed. The first trial was before the court without a jury and at the close of plaintiff's evidence, the court, upon motion of the defendants, entered judgment in favor of the latter. The evidence upon the two trials is substantially alike, except that upon the second trial appellees introduced testimony for the purpose of showing that the original order was from samples; that after the goods which appellants shipped were received at the freight office of the E.J. & E. R.R. Co. in Aurora, appellees took the goods from the freight office; that upon examination they found the goods differed in pattern, color and width from those ordered by appellees; and that on the following day they talked with the salesman who took the order and by his direction returned them to appellants.

The record shows no authority in the salesman to direct their return. Appellees admitted that at no time did they make any complaint to appellants as to any difference in the goods. The only complaint they made to appellants after receiving and examining the goods was as to the delay in their receipt and a drop in the market price. They threatened to return the goods unless the price was reduced. It is significant that appellees had made the same complaint and threat before they received

Abraham S. Fink and William
co-partners, doing business as
Royal Taxable Company,
New York, New York.

Abraham S. Fink and William
co-partners, doing business as
Royal Taxable Company,
New York, New York.

vs.

J. D. Amersbach and W. S. Amersbach,
co-partners, doing business as
Amersbach Taxable Company,
New York, New York.

Jones, et al.

This case was before the court on appeal from the
Gen. No. 7384. An opinion was filed on March 3, 1916,
reversing and remanding the case. On a motion for trial before
jury in the city of New York, a verdict was returned in favor of the
judgment was entered on the verdict and a writ of certiorari was
granted. The trial was before the court and the evidence was
presented. The evidence was taken in the city of New York and
entered judgment in favor of the plaintiff. The evidence was
tried in the city of New York and the evidence was taken in the
introduced testimony that the goods were stolen from the
was from the plaintiff. The goods were stolen from the
received at the freight office of the plaintiff. The goods were
expedited from the office of the freight office; that the
they found the goods delivered in New York, and that the
ordered by the plaintiff and that the goods were delivered
the defendant who took the order and that the goods were
expedited.

The record shows that the goods were delivered to the
return. Appellee admitted that he had received the goods and
evidence as to the delivery of the goods. The evidence was
made to a witness who was present and examining the goods and
delay in their receipt and a jury in the city of New York
to return the goods to the plaintiff. The goods were delivered
that appellee was liable to the plaintiff for the goods.

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and examined the goods.

They contend that the original order constituted a contract but we have already expressed our view on that proposition in our former opinion. And it may be said, also, that the letter written by appellants to appellees upon receipt of the original order expressly stated that appellants would have to substitute on some patterns. The invoice of the goods shipped disclosed that the stock number of the goods shipped differed from that in the original order, and it did not specify the widths or cuts of the goods. The counter-offer by appellants was not to ship the same kind but a different kind of goods than those mentioned in the original order. This counter-offer of appellants was accepted by appellees and they are in no position now to complain that the goods differed from those originally ordered. Whether the original order was by sample or whether the goods shipped corresponded with the samples is immaterial and under the former opinion of this court, testimony on that subject was incompetent. Under the facts in this case, the additional testimony produced on the last trial does not affect the merits of the controversy. We said in our former opinion:- "Appellees' letters cancelling the remaining portion of the order in effect constituted an acceptance of the goods actually shipped and appellees became bound to pay for them."

Appellees' instruction No. 9 is a mere statement of an abstract proposition of law. Appellants complain of the refusal of several of their offered instructions. It is difficult if not impossible to apply the respective arguments of counsel concerning the instructions. The instructions are not numbered in the abstract but are referred to by numbers in various places in the briefs. We cannot in every instance follow the references. In the order in which they appear in the abstract, appellants' first refused instruction involves the question of interest for unreasonable and vexatious delay of payment. This cause has been strenuously contested for a considerable

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length of time, apparently in good faith by all parties, and there was no error in refusing the instruction. The other refused instruction is long and involved, and assumes facts in issue.

Our former opinion is decisive of every pertinent question in this case. The judgment of the city court of Aurora is reversed and the cause is remanded.

Reversed and Remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the _____

opinion
_____ of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 5th day of
Oct. in the year of our Lord one thousand
nine hundred and twenty-one

Justus L. Johnson

Clerk of the Appellate Court

Abstract

348/a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

242 I.A. 653

BE IT REMEMBERED, that afterwards, to-wit: On
OCT 5 - 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Mamie Fleet, Administratrix,
of the estate of Moses Fleet,
deceased,

Appellee,

vs.

Appeal from the
Circuit Court of
Kankakee County.

Illinois Central Railroad Company,
Appellant,

242 I.A. 653

Jones J:

Moses Fleet, in his lifetime, instituted suit for personal injury in the circuit court of Kankakee County against appellant. A judgment was rendered on a directed verdict in favor of the railroad company and the cause was appealed to this court where it was reversed and remanded. (Fleet v. I.C. R.R. Co. 238 Ill. App. 462, memorandum decision.) On November 2, 1925, before the remanding order was filed, the court ordered the cause reinstated and set for trial by agreement of the parties. On the day set the parties proceeded to trial without objection and the jury returned a verdict in favor of Fleet for \$1500. On November 21, 1925, he moved the court for leave to file the remanding order as of November 2, 1925. On December 29, 1925, appellant entered its motion to set aside all proceedings had at the October Term, 1925, prior to November 21, 1925, on the ground that the court had no jurisdiction of the subject matter because the remanding order was not filed prior to that date. The court overruled this motion and allowed appellee's motion. Since the present appeal was perfected, Moses Fleet died and Mamie Fleet, administratrix of his estate, has been substituted as party plaintiff and appellee.

The mandate of this court reversing the prior judgment was not filed in the trial court until November 21, 1925, about two weeks after the cause was tried. At the time this cause was set for trial counsel for appellant called the attention of opposing counsel to the fact that the remanding order had not been filed and the

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latter promised to file it before the trial. It is not an excuse for appellant to say it assumed the remanding order would be filed before it was reached for trial as agreed upon. If it intended to rely upon its rights under the statute, it should have insisted that the order be filed before the cause was reinstated; but it knowingly consented to the reinstatement of the cause without notice and without the remanding order being on file. These facts constitute a waiver.

The case of Block Amusement Co. v. Case 139 Ill. Appl 37 is not in point. The holding there is that the circuit court has no jurisdiction of the subject matter of an appeal from a justice of the peace until the transcript is filed in the circuit court. If upon the appeal in this case, the record had not been filed in this court, the situation would have been analogous, but the order of this court reversing and remanding the cause became effective from the date it was entered, and vested jurisdiction of the subject matter in the circuit court. All that court needed in order to again try the cause was jurisdiction of the parties; and such jurisdiction was acquired by their action and consent. The case of Gerard v. Gateau 15 Ill. App. 520 is decisive of the question and it is there said "We are of the opinion that the voluntary appearance of the complainant in the circuit court, after the decision of the appeal, without waiting for or requiring the formality of a remanding order, and litigating the matter of the assessment of damages, without objection, amounted to a waiver of a remanding order, and authorized the court to proceed to assess the damages."

Where parties enter into an agreement waiving the filing of the remanding order and proceed to trial without it, it would be wrong to permit the loser to escape the judgment on that account.

It is insisted that the declaration does not state a cause of action and that appellee assumed the risk incident to his employment. When this case was here at a former term, we held the evidence disclosed that at the time Fleet was injured he was

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obeying the order of his superior and that in obeying such directions, he could not be said to have assumed the risk, unless the danger was so manifest that an ordinarily prudent man would not have incurred it, and that this was a question for the jury. We think the declaration sufficiently states a cause of action. The third count of the declaration as amended alleges that because of the dangerous place in which his superior had placed him, etc., he was injured. It is a familiar rule that where a cause of action can be said to be alleged by reasonable intentment from the language used, the declaration is sufficient after verdict. (Chicago City Ry. Co. v. Cooney 196 Ill. 466; Sargent Co. v. Baublis 215 Ill. 428.) However, our former opinion in this cause disposes of the question of assumed risk. The declaration is substantially the same now as it was upon the first trial, and the evidence is ~~practically~~ practically the same. Whether or not Fleet assumed the risk was a question for the jury to decide. We are not justified in reversing a judgment, unless the verdict is manifestly against the weight of the evidence, and we cannot say that it is in this case.

Appellant's refused instructions 17 and 18 were fully covered by its given instructions. We have examined all instructions given and refused and we think the jury was fairly instructed and no prejudicial error was committed. The judgment will therefore be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the _____

opinion
_____ of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 5th day of
Oct. _____ in the year of our Lord one thousand
nine hundred and twenty-*five* _____

Justus L. Johnson

Clerk of the Appellate Court

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

242 I.A. 653

BE IT REMEMBERED, that afterwards, to-wit: On
OCT 8 _ 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Anna B. Alguire,

Appellee,

vs.

Appeal from Circuit

Court of Boone County.

Elliot Biester and
Channing T. Biester,

Appellants.

242 I.A. 653

Jett J.

On April, 5th, 1922, a note signed "Biester Bros. by Elliot Biester," and payable to the order of Anna B. Alguire, six months after date for the sum of \$174.25 was delivered by Elliot Biester to appellee. It drew 7% interest from date and shows a credit of \$55.00, payment of that amount having been made by Wm. Biester on December 8th, 1923. The balance due on this note not having been paid, suit was instituted by appellee before a Justice of the Peace and subsequently appealed to the Circuit Court of Boone County, where a trial was had without the intervention of a jury and from a finding and judgment in favor of appellee for \$151.55 this appeal is prosecuted.

The evidence discloses that appellants are sons of Wm. Biester and were living with their father and mother on a farm belonging to the mother near Belvidere. Mrs. Tryphena Turner was the mother of Mrs. Wm. Biester and had a dower interest in the farm and for a number of years prior to her death in 1919 had made her home with her daughter. In 1920 Mrs. Wm. Biester died and the note represents the amount due appellee for professional services rendered appellants, their father, mother and grandmother while living together as a family. After the death of the grandmother Wm. Biester informed appellee that he would take care of the amount due appellee for services rendered Mrs. Turner and subsequently appellee ~~sent~~ sent a statement to Wm. Biester which included all

Anne S. Elster,

Witness.

vs.

Will S. Elster and
Ophelia S. Elster,

Defendants.

Jury 1.

On July 1, 1911, at the City of New York:

Elliot Elster, of the County of New York, State of New York,

six months after death of the said Ophelia S. Elster, was

Elliot Elster, of the County of New York, State of New York,

shows a credit of \$100.00 payment of the same, which was made

by Mr. Elster on December 1st, 1911. The statement is made

note not having been cashed, and was received by the said Ophelia

a Justice of the Peace, and was subsequently received by the said

County of New York, and was subsequently received by the said

tion of a jury and the said Ophelia S. Elster, was

applies for this sum of \$100.00.

The evidence shows that the said Ophelia S. Elster, was

Mr. Elster and Mrs. Elster, who were then and now are

belonging to the mother of the said Ophelia S. Elster, was

the mother of Mrs. Elster, who was then and now are

and for a number of years prior to the death of the said

home with her daughter, in 1911, and since that time has

represents the amount due applies for this sum of \$100.00.

rendered applicants, their heirs, assigns and representatives, with

living together as a family, and the said Ophelia S. Elster, was

Mr. Elster, who was then and now are, and the said Ophelia S. Elster, was

the applies for services rendered by the said Ophelia S. Elster, was

applies for this sum of \$100.00.

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the services rendered by appellee to appellants, their father and mother and Mrs. Turner, the grandmother. Shortly after this statement was sent Elliot Biester, then twenty-six years of age went to the home of appellee and objected to paying the amount due her, for services rendered his grandmother, informing appellee that his grandmother had no estate. Appellee then related to Elliot the conversation in which his father had promised to take care of Mrs. Turner's account and Elliot left, stating that he would see his brother and would let appellee know what they would do about taking care of it. Within a week thereafter he returned and stated to appellee that the amount of the grandmother's bill might just as well be included and delivered to her, the note sued on saying that he had signed it, as he did, because he and his brother were doing business under that name. The evidence further discloses that appellants prior to the execution of the note conferred together about the matter, discussed the items, which went into the note and after the note was executed Channing was informed of its execution and made no objection thereto other than stating that it included his grandmother's account and that Elliot should have waited until after the return of his father who was away at the time but who was expected within a week or two. In response to questions propounded by the court, Channing stated while he and his brother had no specific arrangement about paying this bill, they had taken care of some few matters for their father and that so far as he was concerned the bill was all right. The professional services claimed by appellee to have been rendered, were in fact rendered, and the amount due appellee therefor is not disputed. The conversation between the father of appellants and appellee to the effect that he would take care of the amount due appellee for services rendered Mrs. Turner was not denied, and the fact that a partnership existed between appellants was admitted although appellants now insist that the execution of this note was not in line with the

the section composed of (1) the first, (2) the second, (3) the third, (4) the fourth, (5) the fifth, (6) the sixth, (7) the seventh, (8) the eighth, (9) the ninth, (10) the tenth, (11) the eleventh, (12) the twelfth, (13) the thirteenth, (14) the fourteenth, (15) the fifteenth, (16) the sixteenth, (17) the seventeenth, (18) the eighteenth, (19) the nineteenth, (20) the twentieth, (21) the twenty-first, (22) the twenty-second, (23) the twenty-third, (24) the twenty-fourth, (25) the twenty-fifth, (26) the twenty-sixth, (27) the twenty-seventh, (28) the twenty-eighth, (29) the twenty-ninth, (30) the thirtieth, (31) the thirty-first, (32) the thirty-second, (33) the thirty-third, (34) the thirty-fourth, (35) the thirty-fifth, (36) the thirty-sixth, (37) the thirty-seventh, (38) the thirty-eighth, (39) the thirty-ninth, (40) the fortieth, (41) the forty-first, (42) the forty-second, (43) the forty-third, (44) the forty-fourth, (45) the forty-fifth, (46) the forty-sixth, (47) the forty-seventh, (48) the forty-eighth, (49) the forty-ninth, (50) the fiftieth, (51) the fifty-first, (52) the fifty-second, (53) the fifty-third, (54) the fifty-fourth, (55) the fifty-fifth, (56) the fifty-sixth, (57) the fifty-seventh, (58) the fifty-eighth, (59) the fifty-ninth, (60) the sixtieth, (61) the sixty-first, (62) the sixty-second, (63) the sixty-third, (64) the sixty-fourth, (65) the sixty-fifth, (66) the sixty-sixth, (67) the sixty-seventh, (68) the sixty-eighth, (69) the sixty-ninth, (70) the seventieth, (71) the seventy-first, (72) the seventy-second, (73) the seventy-third, (74) the seventy-fourth, (75) the seventy-fifth, (76) the seventy-sixth, (77) the seventy-seventh, (78) the seventy-eighth, (79) the seventy-ninth, (80) the eightieth, (81) the eighty-first, (82) the eighty-second, (83) the eighty-third, (84) the eighty-fourth, (85) the eighty-fifth, (86) the eighty-sixth, (87) the eighty-seventh, (88) the eighty-eighth, (89) the eighty-ninth, (90) the ninetieth, (91) the ninety-first, (92) the ninety-second, (93) the ninety-third, (94) the ninety-fourth, (95) the ninety-fifth, (96) the ninety-sixth, (97) the ninety-seventh, (98) the ninety-eighth, (99) the ninety-ninth, (100) the hundredth.

partnership business.

The principal defense relied upon is that there could be no recovery on the note in question against members of the partnership because the services for which the note was given was not partnership business. It will be remembered that this suit was instituted before a justice of the peace and an appeal was prosecuted to the Circuit Court and an amendment was made making Channing T. Biester a defendant and he entered his appearance. The record discloses that during the progress of the trial it was conceded that the note in controversy was a partnership note and that the partnership consisted of Elliott Biester and Channing T. Biester, doing business as Biester Bros. The evidence further discloses that Elliot Biester in the first instance objected to the payment of the amount claimed by appellee. Appellee then related to him a conversation in which she stated that Wm. Biester, his father, had promised to take care of the account of Mrs. Turner which was included in the ~~order~~ claim of appellee and Elliot stated that he would see his brother and let appellee know what he would do about taking care of the claim. In a few days thereafter he returned and stated ~~him~~ to appellee that the amount of the grandmother's bill might just as well be included and delivered to her the note sued on saying that he had signed it as he did because he and his brother were doing business under that name.

The evidence further discloses that appellants prior to the execution of the note conferred together about it, discussed the items which went into the note and after the note was executed Channing was informed of it. Furthermore the record discloses that in response to questions propounded by the court Channing stated that while he and his brother had no specific arrangement about paying the bill they had taken care of some few matters for their father and that so far as he was concerned it was all right.

In view of the fact that it was conceded on the trial that the note in controversy was a partnership instrument and that the

appellants composed the partnership, together with the understanding and agreement that was had between the partners before the execution of the note and other facts as detailed herein relative to their conduct bearing upon the execution of the instrument, we are of the opinion that the appellants are not in any position to now insist that there should be no recovery against them because of their claim that this was not partnership business. Also the record discloses that the partners individually acknowledged the justness of the debt. The note was signed as it was because that was the way they did business.

We have examined the other contentions urged by appellants but in view of all the facts and circumstances as disclosed by the record we are of the opinion that the judgment of the Circuit Court of Boone county should be affirmed which is accordingly done.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 8th day of
Oct. in the year of our Lord one thousand
nine hundred and twenty-~~six~~ six

Justus L. Johnson
Clerk of the Appellate Court

abstract

5483a
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the ~~sixth~~^{fifth} day of
October
~~April~~, in the year of our Lord one thousand nine hundred
and twenty-six, within and for the Second District of the
State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

242 I.A. 653

BE IT REMEMBERED, that afterwards, to-wit: On

OCT 20 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

The Knights of the Ku
Klux Klan, Inc.,

Appellee,

vs.

Appeal from the County

Court of Grundy County.

Godfrey C. Berg and
Charles N. Wallace,

Appellants.

242 I.A. 653

Jett J:

This is a suit in assumpsit instituted by the Knights of the Ku Klux Klan, appellee, against Godfrey C. Berg and Charles N. Wallace appellants. The declaration consists of the common counts for money had and received and upon an account stated. To the declaration appellants pleaded the general issue and nul tiel corporation. To the plea of nul tiel corporation appellee demurred which demurrer was sustained by the court. Appellants stood by their ples.

It appears that appellant Berg was the former Exalted Cyclops of the local Klan at Morris, Illinois; that Wallace was the treasurer and that the local unit was not a chartered organization but was what was known as a Provisional Klan. It is insisted that on August 18th, 1924, at a regular meeting of the Provisional Klan it was moved, seconded and carried that the Morris Provisional Klan vote the sum of \$530.00 to Shabbona Klan No. 16. Shabbona Klan No. 16 was not a unit of the Knights of the Ku Klux Klan. Berg the Exalted Cyclops signed an order on Wallace, the treasurer, for the payment of \$530.00 to Shabbona Klan No. 16. At the time this was done appellants were members of the Knights of the Ku Klux Klan.

A jury trial was had with a finding in favor of appellee and against appellants for \$530.00 on which judgment was rendered and appellants prosecute this appeal.

It is the contention of the appellants that the court committed error in refusing to direct a verdict, in the admission of evidence, in the giving and refusing of the instructions and in sustaining the

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demurrer to the plea of nul tiel corporation.

The declaration charged that appellee was a corporation. By the plea of nul tiel corporation as originally filed appellants put themselves upon the country. It was afterwards amended with a verification. The demurrer was general and not special and for that reason we think the court was in error in sustaining the demurrer to the plea. Although there was no plea of nul tiel corporation appellee sought to prove that there was in fact a corporation, In order to make such proof it offered in evidence a certificate signed by the judge and clerk of the Superior Court of Fulton County, Georgia, purporting to show an order of court authorizing the incorporation of appellee. This certificate is defective in several respects. It is not certified as provided by the Act of Congress, no copy of the charter was admitted in evidence, and there was no proof as to the law of Georgia as a basis for the incorporation of appellee. In an effort to sustain its case appellee offered in evidence its constitution and by-laws together with the affidavit of the Imperial Kligrapp (Supreme Secretary) that the document consisting of ninety-six pages was the constitution and by-laws of appellee. The affidavit of the Imperial Kligrapp and Jurat is as follows:

"STATE OF GEORGIA)
) SS
COUNTY OF FULTON)

Personally appeared before the undersigned Notary Public ~~and~~ in and for said County, H. K. Ramsey who on oath says:

That he is the Imperial Kligrapp (Supreme Secretary) of the Knights of the Ku Klux Klan, a corporation duly chartered under the laws of the State of Georgia.

That the attached booklet entitled Constitution and Laws of The Knights of the Ku Klux Klan (Inc.), being a printed volume of ninety-six (96) pages, and ~~beginning~~ being identified on the bottom of page 96 by the signature of affiant (the printed form bearing a facsimile signature of affiant), is the duly authenticated, official Constitution and Laws of

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the Knights of the Ku Klux Klan; that the same is now recognized and used by the organization throughout the Nation, and that there have been no amendments or additions thereto; and that said document is the entire constitution and laws of the organization.

Affiant further says that he is the proper officer of the corporation to make this affidavit and certificate.

H. K. RAMSEY,

Sworn to and subscribed before me this 30th day of August, 1924.

MRS. CARREL FOSTER.

Notary Public, Fulton County, Georgia."

Section 6 of chapter 101 of the Revised Statutes is as follows:

"When any oath authorized or required by law to be made is made out of the State, it may be administered by any officer authorized by the laws of the State in which it is so administered, and if such officer have a seal, his certificate under his official seal shall be received as prima facie evidence without further proof of his authority to administer oaths."

By the general law merchant a notary public did not have power to administer oaths. Such authority is only conferred by statute, and will not be presumed to exist, but must be proven. Keefer vs Mason, 36 Ill. 406.

The supposed affidavit of H. K. Ramsey, Imperial Kligrapp, as above set forth, sworn to in the State of Georgia, under said statute was void for the reason the notary made no certificate of her authority to administer oaths under the laws of the State of Georgia. Keefer vs Mason, supra; Smith vs. Lyons, 80 Ill. 600; Farris vs. Commercial Nat. Bk. 158 Ill. 237; Trevor vs Colgate, 181 Ill.129; Desnoyers Shoe Co. vs The First Nat. Bk. etc. 188 Ill. 312-317-318.

It will not do to say that the Jurat and seal of the Notary Public attached to said affidavit established prima facie the fact that said notary public had authority, under the laws of the State of Georgia, to administer oaths. This contention cannot be sustained.

In Trevor vs Colgate, supra, at page 131 the court said:

"The position of counsel for appellees is, the

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certificate of the notary, under his official seal, that he has administered the oath, is made by said section 6 prima facie proof that the notary had authority to administer oaths. That construction cannot be accepted. The meaning of the section is, if the notary shall certify, under his official seal, that he has authority to administer oaths under the statute of the State under which he holds his commission, such certificate shall be prima facie evidence that he has such statutory authority."

We are of the opinion that the trial court erred in the admission of the Constitution and Laws of the Knights of the Ku Klux Klan, Inc.

It is also insisted by appellants that the court erred in giving a number of instructions on the part of appellee. The third instruction reads as follows:

"The court instructs the jury that before the Klan could vote its fund out of the treasury the purpose for which they were voted must have been within the scope of their authority, and in this case if you believe from the evidence by a preponderance thereof, that such purpose of voting \$530.00 was contrary to the by-laws of the Knights of the Ku Klux Klan and ultra vires or beyond their right, then such vote was illegal and you should find the issues for the plaintiff."

In view of the fact that the constitution and laws of the Knights of the Ku Klux Klan were not properly before the jury it is quite apparent that this instruction should not have been given.

The fourth instruction given on the part of appellee is as follows:

"The Court instructs the jury that the plaintiff is required to prove his case by a preponderance of the evidence only, and in this case if the evidence shows by a preponderance that the money and property in question was the property of the plaintiff, and if you further believe from the evidence that the defendants' claims that the money and property was voted to him as a gift then the burden of proving a preponderance of the evidence that the property and money were voted as a gift, and without legal authority and power shifts to the defendant and unless he so proves, you should find the issues for the plaintiff and against the defendant."

The burden was not upon the defendants to prove by a preponderance of the evidence any fact in the case but on the contrary the burden of proof was upon the plaintiff to prove its

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case by the greater weight of the evidence.

Other reasons have been assigned and argued for a reversal of the judgment in this cause but ~~owing~~ owing to the conclusion we have reached we do not deem it necessary to enter upon a further discussion of the questions raised.

In view of the condition of the record the judgment cannot be sustained and it will be reversed and the cause remanded which is accordingly done.

Reversed and Remanded.

STATE OF ILLINOIS,
SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the
above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 20th day of
October in the year of our Lord one thousand
nine hundred and twenty-six

Justus L. Johnson
Clerk of the Appellate Court

Opinions filed April 13-1926
Rehearings denied June 22-1926
5397a
General No. 7911

Agenda No. 19

October Term 1925

James White, Defendant in Error.

vs.

Roland B. Stafford and Edward C. Broehl, Plaintiff's
in Error.

Error to Logan.

NIEHAUS, P. J.

In this case James White, the defendant in error, sued the plaintiffs in error, Roland R. Stafford and Edward C. Broehl, in the circuit court of Logan county, to recover a share of the money collected by the plaintiffs in error as a commission for the sale of a 608 acre tract of farm land in Pike county. There was a trial by jury, and a verdict and judgment for \$5333.33 in favor of the defendant in error. A writ of error is now prosecuted from the judgment.

Several questions are presented for review, as a reason for reversal of the judgment. It is insisted, that the evidence adduced for the plaintiff to sustain his cause of action is insufficient; and that the verdict is contrary to the weight of the evidence. Error is also assigned on the court's refusal to give certain instructions for the plaintiffs in error; and that the court unduly restricted the cross examination of witnesses for defendant in error. The defendant in error based his cause of action upon an agreement, which he testified he had with the Plaintiffs in error, based upon a conversation with Roland R. Stafford, one of the plaintiffs in error, and which occurred in an automobile in which they were riding with other people, from Barry to New Canton, about the time when the plaintiffs in error as real estate agents or brokers, were making efforts to sell the 608 acre tract of land referred to. The defendant in error's version of the matter, is as follows: "I had a talk with Mr. Stafford, and I was riding from Barry to New Canton; or Mr. Lechleiter and I and Stafford was riding from New Canton to Barry; and I said to Stafford, 'if I will furnish the man to buy this 608 acres of land, what commission will

you give me?" He said, 'I will cut it in two with you—fifty-fifty,' and I told him the man; that Mr. Lauer would look at it and probably buy it." The evidence shows, that Mr. Lauer afterwards did look at it, and bought it. Stafford in his testimony denies having made the agreement with the defendant in error, testified to by him; and whether or not the agreement to divide the commission in case the defendant in error furnished the purchaser was made, was the main controverted question of fact on the trial. The evidence in reference to this issue was very conflicting, and involved the determination of the credibility of the various witnesses who testified concerning the matters in controversy. It was therefore peculiarly a question that came within the province of the jury to determine. This court would not be warranted in reversing the judgment on the questions of fact involved, unless the verdict of the jury is manifestly contrary to the weight of the evidence; and we cannot say, that this verdict which has the sanction of the trial court, can be so regarded.

Complaint is also made in reference to the refusal of the first and third instructions requested by the plaintiffs in error. We are of opinion, that the instructions referred to were properly refused. Both contained the legal proposition, that it was necessary for the defendant in error to prove by a preponderance of the evidence that he "was the efficient or producing cause and effective means of bringing about the sale in question." Whether the plaintiff was the efficient or producing cause and effective means of bringing about the sale, was not an issue in the case. The only issues of fact involved were, whether the plaintiffs in error made the agreement testified to, by which the defendant in error would, if proven, become entitled to one half of the commission received by them for making the sale; and whether defendant in error did produce the purchaser to whom the sale was made.

It is contended also that the court unduly restricted plaintiffs in error in their cross examination of the witnesses for the defendant in error. The matter of cross examination, especially

in a civil case, must necessarily rest largely in sound judicial discretion; and unless this discretion is abused so as to result in injury, the limitations of cross examination are not regarded as reversible error. The record discloses that the court did not give plaintiffs in error as wide a range of examination as may have been legally permissible; but we do not regard the restrictions enforced, as being undue, or of a character to deprive the plaintiffs in error of any substantial right in that respect; the rulings of the court therefore, are not regarded as reversible error. And we find no reversible error in the exclusion or admission of evidence. Judgment is therefore affirmed.

Judgment affirmed.

5396a

General No. 7933

Agenda No. 37.

October Term 1925

In the matter of the Petition of George G. Robertson,
to probate the Will of O. B. Grant, deceased,
and for the Appointment of George G.

Robertson as Executor.

Appeal from Clark.

242 I.A. 654

NIEHAUS, P. J.

This is an appeal from the order of the circuit court of Clark County, refusing to order the probate of the will of O. B. Grant, who died January 19, 1925. The Will is as follows:

The Last Will and Testament of O. B. Grant of the City of Casey in the County of Clark and State of Illinois, made and published the 3rd day of April in the year of our Lord, One Thousand Nine Hundred Twenty-Two.

IN THE NAME OF GOD, AMEN. I, O. B. Grant, of the City of Casey in the County of Clark and State of Illinois, of the age of 77 years and being of sound mind and memory, do hereby make, publish, and declare this, my LAST WILL AND TESTAMENT, in manner following, that is to say:

FIRST—It is my will that my funeral expenses and all my just debts be fully paid.

SECOND—I give and bequeath to my brother, Luther Grant, if he should out live me, the sum of Five Hundred Dollars (\$500.00.)

THIRD—I give and bequeath to Irvin Grant, son of said Luther Grant, the sum of Five Hundred Dollars (\$500.00.)

FOURTH—I give and bequeath to Mrs. Hall, the daughter of said Luther Grant, the sum of Five Hundred Dollars (\$500.00).

FIFTH—I give and bequeath to my nephew, Charley Grant, the sum of Five Hundred Dollars (\$500.00), to be used by him in the purchase of a home.

SIXTH—I give and bequeath to Fanny Grant, widow of Halbert Grant, the sum of Two Hundred Dollars (\$200.00.)

SEVENTH—I give and bequeath to my old neighbors and friends, James Robinson and wife, of Bellair, Illinois, the sum of Five Hundred Dollars (\$500.00.)

EIGHTH—I give and bequeath to the Cemetery, where my father and relatives are buried, located near East Pharsalia, Chenango County New York, the sum of One Hundred Dollars (\$100.00,) to clean up said Cemetery.

NINTH—I give, devise and bequeath all of the balance and residue of my property of every kind and character and wherever situated to my daughter, Bertha Yager, to be her absolute property.

LASTLY—I hereby nominate and appoint my friend, George G. Robertson, to be the Executor of this my LAST WILL AND TESTAMENT, hereby revoking all former wills by me made.

IN WITNESS WHEREOF, I have hereunto set my hand and (SEAL)¹ seal the 3rd day of April, in the year of our Lord, One Thousand Nine Hundred Twenty-Two.

O. B. Grant.

The deceased left surviving him his daughter, Bertha Yager the appellee, his sole and only heir, who is the residuary legatee in his will.

The appellant George G. Robertson, who is named in the will as executor, filed a petition in the county court of Clark county for the probate of the will; whereupon the appellee as the sole heir of the deceased and residuary legatee in his will, filed objections in the county court to the probate of the will, which objections were overruled, and an order was made probating the will. From the order probating the will an appeal was taken to the circuit court. Upon the hearing in the circuit court additional objections were filed by the appellee. There was a hearing in the circuit court upon the appellee's objections; and the evidence taken at the hearing discloses, that all the parties in interest in the property disposed of by the will, the legatees and devisees, had agreed to accept the portions of the Estate bequeathed to them, from the appellee as the sole heir and residuary legatee; and that subsequently in accordance with said agreement, the appellee paid all the legacies and bequests required to be paid under the provisions of the will; and that she had also paid the funeral expenses and all debts and claims against the estate of the deceased, including the federal inheritance tax; and had made arrangements also to pay the state inheritance tax when the amount thereof was ascertained by the attorney general. The evidence also shows, that prior to his death the deceased had pl

his entire estate in the possession and under the control of the appellee; and it was in her possession and her control at the time of filing the petition.

In this state of the record, it is apparent that all the provisions of the will of the deceased concerning his property and estate had been carried into effect. That all the debts and claims against the estate of the deceased had been paid, as well as the federal inheritance tax, by the sole heir and residuary legatee; there was therefore no necessity for administration of the estate of the deceased; and the probating of the will, and issuing of letters testamentary to the petitioner, would have been a work of supererogation, which would merely result in going thru a useless form and for the sole benefit of the petitioner, who would thereby earn certain commissions as executor; and the commission which the petitioner might claim, as well as the additional costs of administration incurred thereby, would have to be borne by the appellee as residuary legatee. It has been repeatedly held, that under these circumstances administration should not be granted on estates. **Lewis v. Lyons** 13 Ill. 117; **Abbott v. The People** 10 Ill. App. 66; **The People v. Abbott** 105 Ill. 588; **Moore v. Brandenburg** 140 Ill. 232. And we are of opinion, that the principle upheld in **Cole v. Cole** 292 Ill. 154 applies to the present case. It was there held, that the devisees under a will may enter into a contract with reference to the property devised to them, and such a contract supercedes the will, and the will is thereby set aside; and the property becomes interstate property; and is subject to the control and disposal of the devisees the same as if it were interstate property; and that the probate of the will therefore becomes unnecessary.

For the reasons stated, the order of the circuit court is affirmed.

5399a

General No. 7938

Agenda No. 40

October Term 1925

Richard H. Johnson, Appellee

242 I.A. 654

v.

Illinois Power Company, Appellant

Appeal from Sangamon.

NIEHAUS, P.J.

This case involves an appeal from a judgment of \$5000.00, which was recovered against the appellant, Illinois Power Company, by the appellee, Richard H. Johnson, in the circuit court of Sangamon county. The amount recovered is for damages alleged to have been sustained by the appellee for personal injuries, and for the destruction of his automobile, in consequence of the alleged negligence of the servants of appellant in the operation of its street car line in the city of Springfield. The allegation of negligence upon which any verdict could be rendered for the appellee declaration is, 'that the appellant by its servants left a loaded cinder car standing on a switch connected with its main tracks, on South Grand Boulevard, in the night time; and that the appellant failed to notify the appellee and others using South Grand Boulevard, by the use of lights or other means, of the presence and location of the cinder car, and work cars standing on the switch track upon the said South Grand Boulevard; and that the appellee while driving his automobile in the night time, and while in the exercise or reasonable care and caution for his own safety, collided with said obstruction and was thereby damaged.'

It is the contention of the appellant on appeal, that there is no legal evidence in the record upon which any verdict could be rendered for the appellant and that therefore the court should have directed a verdict for the appellant. It is also contended that the verdict is manifestly against the weight of the evidence; and that improper instructions were given: and that proper instructions for the appellant were refused.

The testimony of the appellee, concerning the collision of his automobile with the cinder car in question, is as follows: "On the night of the 21st of February, about eight o'clock in the evening, I drove down town in my automobile, a seven passenger Marmion, which I bought in May 1921, and drove until the night it burned up, February 22nd. I don't remember the time I left home; drove on Park Avenue to South Grand, then to Fourth or Fifth street; there was no one with me; when I got down town I made several calls at the clubs and the hotel; I think that is about all I can say; had no special business, just came down to visit with friends; started home about one o'clock; it seems to me as though it was quite damp and a steamy, cold, nasty night; a typical February night; I went out on Fourth or Fifth street to South Grand Avenue, and then west on the avenue to where the accident happened; there was no one with me; after I turned the corner to go west in South Grand Avenue, and across the Alton tracks, I met two or three automobiles coming in the opposite direction; was going along on my way home when the first thing I noticed was a dark object loomed up in front of me. **** I am familiar with the speed of an automobile; when I saw the object which I struck, I was driving about fifteen miles an hour; was north of the car track on the right hand side of the street; possibly my left wheels were inside the rail, but I doubt it; I followed the center of the street because the pavement between the loop where the cars pass is very rough, and I wanted to avoid these holes; I had driven that street every day and evening for a long time, and wanted to keep out of them; for that reason, I kept the center of the street; had headlights in front of my automobile; my headlights would probably throw a light twenty to thirty feet; as I drove west in South Grand Avenue, I saw other automobiles driving in the opposite direction, coming towards me; didn't notice any going in the direction I was driving; passed two or three cars in the opposite direction, from the time I turned into West Grand Avenue until I had the accident.

My attention was first attracted to a dark object as I drove along when the lights shown on it, not over twenty or twenty-five feet from my car, when my lights flashed on it; didn't have very much time to do anything; tried to avoid it by turning my car quickly to the left; didn't have time to put my feet on the brake, but had hold of the wheel and tried to dodge it, and I almost missed it; the right side of my automobile struck the left hand back corner of the car, probably two or three feet—I don't know what happened after that; the next thing I knew, I was terribly shocked, and thought I was scalded or burning up; I got out of the car on the right side, next to the side walk, after groping around in the dark and suffering pain and agony, I met one of the street car employees and talked with him; he asked me what happened, and I couldn't answer at first, then I said, 'don't you see what happened? I hit the street car.' He said, 'how did you happen to hit it?' And I said, 'there is no light on it; coming along here in the darkness, and the car out here with no light on it, I hit it.' The employee disappeared for a few minutes, and came back and said, 'why, there is a light on it,' and said, 'can't you see it?' And I said, 'yes, I can see it now.' He went up and turned it on. I said, 'I can see it now, but it wasn't there before' **** "As I approached this car, immediately before the collision, there was no light of any kind, either red light or bright light, or light of any color; I don't mean passing automobiles, but no light along the street or on the motor or cinder car. There are electric lights along the boulevard, but they weren't lit; there were lights down town and lights probably farther east on South Grand Avenue."

The testimony of the appellee is apparently corroborated by Carl H. Elshoff, concerning the condition of the street with reference to lights. Elshoff lived in the immediate vicinity of the place where the collision occurred; his testimony on this

point is as follows: "I was at home on the night of February 21st, and on the early morning of the 22nd, 1922, and I was awakened early in the morning by the blowing of a horn; the noise was similar to the noise of the horn on my car. I got up and went to my back window; I looked at the garage and saw there was nothing there, and came to the front window, and discovered that the noise was coming from a point directly south of my house. At that time I was unable to see anything; and the condition of where this sound came from was very dark. I stood there a short period of time and then this horn stopped blowing; I heard some loud talking, and the lights of a street car were lighted; sometime after some object broke into flame; I could not tell what it was. The street car which I referred to was not lighted when I first look out; the lights came on sometime afterwards. * * * * I could tell from the lights of the street car that it was a street car. I am familiar with South Grand Boulevard and the street lights there. There were no street lights burning at the place or in the immediate vicinity of where this horn was blowing that I could see. There was nothing to prevent my seeing the street lights if they had been burning."

This testimony of appellee and the witness Elshoff was directly contradicted by Floyd Buskirk and J. H. Prince, two of appellants' employees, who had charge of the work car and cinder car referred to, which were standing on the switch. Prince, who was a car operator, testified, that on the night in question, he started with the cars from the power house on Eleventh and Capitol Avenue, about one thirty in the morning, with the motor car in the lead, and was pulling the cinder car; which was the relative position of the two cars all the way out to the switch on South Grand Avenue. That when they got on the switch track on South Grand Avenue, they pulled in on the north side of the switch, opposite the boulevard light, to see to uncouple; that he could see the boulevard lights all along the street about fifty feet

apart, and that there were three lighted and burning in the block where the collision occurred. That there was a head light on both ends of the motor car; and that both were burning at that time; that there was a cluster of lights inside of the cab near the front end, one right near the middle, and one set on the far end of the cab; and that every light was burning. That there was a red light on the back end of the cinder car. That in addition to that conductor Buskirk carried a regular railroad lantern; it was a white light and regular signal oil was used in it. Floyd Buskirk, the conductor referred to, also testified, that the boulevard lights in the vicinity of the collision were burning; that there was a head light on each end of the motor car, on the platform; and that there were three clusters of lights in the cab, one in the center and one at each end; and that there was a red light on the rear end of the cinder car, just a common red lantern; and that he carried a Wabash railroad lantern. That after they got to the switch, with the cars, he took a block of wood off of the motor car, and put it under the front end of the cinder car; and then uncoupled the two cars. That Mr. Prince went to the west end of the switch, backed through the east end, and then coupled on the load of cinders. That in the mean time, he changed the red light from the back of the cinder car to the front. He testified further, "after I had changed, I walked to the end where we were to couple on, and stood there waiting for Mr. Prince to come up. After he came up, the cinder car was on the west end of the motor car. Up until then I hadn't noticed anything out of the ordinary. I recoupled the two cars, got the block of wood I had placed under the wheel of the cinder car, tossed it up on the motor car. I heard a roar, and as I started to get up on the motor car, there was a crash. An automobile had started to blow with the crash. Mr. Prince and I walked back to the automobile; it was a seven passenger Marmon car." He also testified that the weather was clear, no fog or mist of any kind; and the pavement was dry.

It is apparent in this state of the record, and in view of the testimony of these witness, that the court did not err in refusing to direct a verdict for the appellant. Concerning appellant's contention that the verdict of the jury is manifestly against the weight of the evidence, it may be said, that in this case the determination of that question involved passing on the credibility of the witnesses, which is for the jury. The jury was in the best position to determine whether of the appellee and his witnesses told the truth concerning the controverted matters of fact, or the witnesses for the appellant, by applying the usual and natural tests, and considering the testimony in connection with all the other evidence in the case. Nothing is disclosed in the record which would justify this court in holding, that the jury should have believed the testimony of appellant's witnesses, rather than the testimony of the appellee, and his witnesses. Where the determination of the question, whether the verdict is against the manifest weight of the evidence depends on adjudging the matter of the credibility of witnesses who testify in contradiction of one another, the determination of that matter by the jury should not be set aside, unless there is reason to believe, that the deliberations of the jury were affected to some extent at least by prejudice or passion. **Gerdes v. Niemeyer** 193 Ill. App. 574; **Ryan v. Hart** 200 Ill. 470.

Error is assigned also on the giving of the fourth instruction for the appellee, which relates to damages. This instruction is criticised because it is claimed, that it does not confine the jury to the evidence, in estimating damages. We do not find this to be the purport of the instruction; its apparent purpose was merely to inform the jury, that if they believed from a preponderance of the evidence, that the plaintiff was entitled to recover damages for personal injuries, and damages for injuries to his automobile, that the jury might add the two items together, and fix one entire amount by their verdict. Complaint is made about the refusal of certain instructions. We are of opinion

that these instructions were properly refused. The only matters contained in the refused instructions, which appear to be pertinent to the issues, relate to the care to be exercised by the appellee; these matters were defined in other instructions, given for appellant. The given instructions for the appellant correctly and clearly covered all the questions of law properly pertinent to appellant's defense. The amount of damages fixed by the jury was warranted under the evidence, and does not appear to be excessive.

For the reasons stated, the judgment is affirmed.

Judgment Affirmed.

General No. 7942.

Agenda No. 43

October Term, 1925

A. F. Loehr et al, Appellants

vs.

P. H. Shuttleworth, Appellee.

Appeal from Macoupin

242 I.A. 654

NIEHAUS, P. J.

In this case the appellants, Adolph F. Loehr, Mrs. Pauline Surman, Mrs. Matilda Johnson, Mrs. Ida Schreiber and Theresa E. Loehr, brought suit to recover a balance of rent claimed to be due from the appellee P. H. Shuttleworth, for certain premises, namely, a double store in the Loehr Building, located in the City of Carlinville.

The case was tried by the court without the intervention of a jury; and after hearing the evidence, the court found the issues in favor of the appellee, and entered judgment in bar against the claim of appellants. This appeal is prayed from the judgment.

It appears from the evidence, that the appellee leased the premiss referred to for a term beginning January 1, 1924, and ending December 31, 1928. The amount of rent agreed on was \$2700.00 for the year 1924, payable \$225.00 monthly in advance; and \$3000 for each succeeding year, payable \$250.00 monthly in advance. The appellee used the premises for a 5 and 10 cent store. At the time the lease was made, the Standard Oil Company operated two coal mines near Carlinville, know as the 'Berry mine' and the Shoper mine;' and the lease contains a provision with reference to the operation of the mines. There is a clause which provides, that the monthly rental to be paid by the appellee to the appellants, shall be \$200.00 per month, when a "strike" or "lockout" occurs and continues; another provision has reference to the amount to be paid, in case the mines should be permanently shut down. The latter provision is as follows: "That, should the said mines be shut down

permanently, and large scale coal production, as now being carried on, and in process of continuing in this vicinity, be at an end at any time during the life of this lease, then and in that case, this fact being generally recognized, the monthly rental to be paid by the party of the second part to the party of the first part, shall be reduced to One Hundred and Fifty Dollars (\$150.00) per month."

The evidence shows that the mines in question were shut down November 20, 1923; but not on account of any strike or lockout, nor because of any disagreement between the operator and the miners. The shut down continued until May 1 following, when the Shoper mine resumed operations, and has since continued to operate; and at the time of the trial, was employing about 600 men, and producing about 4000 tons of coal per day. About January 1, 1924, after the mines had shut down, the appellee insisted, that the monthly rental had been reduced to \$150.00 per month, under the provisions of the lease, because apparently there had been a permanent shut down of the mines, and made out a check for that amount, to pay the appellant, A. F. Loehr, the rent he claimed was due to February 1. The appellant at first refused to accept the check; but finally accepted it, insisting that was only a partial payment of the amount of rent due; and gave the appellee a receipt to that effect. The check given in payment of the rent, had a notation written in the corner on the margin of the check, "Rent to February 1st." In the same manner checks were made out by the appellee for the succeeding months of February, March and April, with the same notation, and accepted by the appellant in the same way giving receipts acknowledging partial payment only. On May 1, when the Shoper mine resumed operations, the appellee again made out a check for the full amount, \$225.00, which he paid to the appellant for the month of May.

The controversy in the case concerns the construction to be given that provision of the lease in reference to a permanent

shut down of the mines.

It is insisted by the appellee, that because the mines at the time they were shut down, had ceased operation indefinitely, from a legal standpoint it amounted to a permanent shut down of the mines. We cannot agree with this contention; it is evident that the closing of the mines was not permanent, inasmuch as the Shoper mine resumed operations after a period of about five months, and continued operating thereafter on an increasing large scale. This is of itself a complete refutation of the appellee's position and claim, of the permanency of the shut down. But it is also contended, that the appellant Loehr accepted the checks for \$150.00 as a payment in full of rent due respectively for the months of January, February, March and April, 1924, inasmuch as the checks had notation on the margin referred to; and that his acceptance of the checks therefore amounted to an acknowledgement, of full payment of rent due for the respective months. The evidence however, is clearly to the effect that appellant always insisted, that he was not receiving the full amount of rent due, and made his receipts to show that he was receiving partial payments only for the months in question. The receipts given by the appellant at the time he received the checks, were parts of the same transaction and must be considered with the notations on the checks. And considered in this way, no presumption could arise that the appellant accepted the checks as full payments of the rent due. Moreover, the notations on the checks do not expressly import payment in full for the months in question, although in the absence of qualifying evidence, such an inference could properly be drawn.

For the reasons stated, we are of opinion that the provision of the lease referred to, under the evidence in the record, did not go into effect; and that appellee was not entitled to claim a reduction of rent on that account; and that appellants are not estopped in accepting the checks referred to, from recovering the balance due in accordance with the terms of the lease. The judgment is therefore reversed, and the cause remanded.

5400

242 I.A. 655

General No. 7939

Agenda 41.

October Term, 1925

Thomas Morris, Appellee.

vs.

Fort Dearborn Casualty Underwriters, Appellant.

Appeal from the Circuit Court of Fulton County.

CROW, J.

Thomas Morris, appellee, brought an action in assumpsit against appellant, on an insurance policy, indemnifying him against loss of an automobile by theft, as we gather from the briefs filed. On trial by jury, after all the evidence was in, the court directed a verdict in favor of plaintiff for \$1500. Defendant's motion for a new trial having been overruled, judgment was rendered for plaintiff against defendant and for costs. Defendant brings the record by appeal to this court seeking a reversal of the judgment. It assigns as errors admission of improper evidence; rejecting proper evidence for appellant; improper restriction of cross-examination by counsel for appellant; allowing motion for directed verdict for appellee; the verdict is contrary to the evidence, to the law, and to the law and the evidence.

The abstract of the record consists of twelve pages the assignment of errors occupying the twelfth page. As indicated by the marginal numerals the record consists of 126 pages. Unless some matter in the record is omitted entirely from the abstract, the declaration occupies pages 6 to 27 of the record, though abstracted on one third of a page. Pleas, additional pleas, and amended additional pleas, demurrers, replications and rejoinders occupying pages 28 to 53 of the record, as shown by the marginal numerals, are abstracted in little more than two pages.

While the whole controversy depends upon the respective contentions of the parties embraced in their pleadings, we can only know what those contentions were by going to the pages of the transcript as indexed. Objections to evidence made throughout the trial could only be determined by the presiding judge by

reference to the issues made by the pleadings. Whether he ruled properly or improperly we cannot say on account of the condition of the abstract. What the controversy really was, and whether rightly determined, we cannot from the abstract even conjecture. The trial judge had the pleadings before him, and all presumptions are indulged in favor of correct rulings and judgment until the contrary is manifest on appeal in the manner prescribed by law.

The basis for these observations is rule 22 of Rules of Practice of this court adopted pursuant to statutory authority:

"In all cases, the party bringing a cause into this court shall furnish a complete abstract or abridgment of the record therein, referring to the appropriate pages of the record by numerals on the margin, and shall cause such abstracts to be printed in a neat and workmanlike manner****. The abstract must contain a complete index, alphabetically arranged, giving the page where each pleading, exhibit or other document may be found, with the name of the witnesses and the pages of their direct, cross and redirect examination.

"The defendant's counsel shall be permitted if not satisfied with the abstract or abridgment furnished by plaintiff's counsel, to furnish such further abstract as he shall deem necessary to a full understanding of the merits of the case.

*** *** ***

"The index must give not only the number of each exhibit and documents in evidence, but must also describe it by its character, parties, data, etc., so as to distinguish it from every other exhibit or document in the record."

The abstract filed here complies in no respect with the rule. It is a mere index to the record. The purpose of the printed abstract or abridgment is to obviate the labor necessary to an examination of the unabridged record. Statements in briefs are not abstracts and will not be allowed to take the place of an abstract. Enough must be printed in the abstract to present the exact points for decision. If not, the judgment below will be affirmed, grounds for reversal not appearing.

We are not without the guidance of authority in this conclusion. Beginning more than sixty years ago, in *Kellehr v. Tisdal*, 23 Ill. 354, the Supreme Court threatened to refuse to review cases thereafter unless the abstract should be sufficient to present the point upon which error is alleged. Four years later the threat was repeated in *Shackelford v. Bailey*, 35 Ill. 387,

in an opinion written by Mr. Justice Breese, who wrote the opinion in the previous case. In *Roodhouse v. Christian*, 158 Ill. 137, the court applied the rule as to the necessity of a full abstract in deciding the case upon complaint of erroneous instructions. The court refused to examine them for the reason they were not abstracted. In *City Electric Ry. v. Jones*, 161 Ill. 47, Mr. Justice Cartwright speaking for the court said:

"Everything on which error is assigned must appear in the abstract, and since none of the instructions given or refused so appear, neither this court nor the Appellate Court could be asked to consider the giving of instructions complained of."

In *Gibler v. Mattoon*, 167 Ill. 18, it is said.

"We cannot reverse a judgment at the instance of one who, so far as we can see, has no interest in the matter. Nor are we called upon to explore the record to find the alleged technical errors to sustain the assignment of errors as to the first mentioned eleven plaintiffs in error and to pick out the tracts owned by them, if any. ^{***} It is the duty of parties bringing cases here for review to prepare and file complete abstracts of the record in accordance with the rules, and such abstracts as we can safely rely upon. It is not our duty to perform this work of counsel, which, in detail, as to them is inconsiderable, but when imposed upon us, is in the aggregate extremely burdensome. It is not meant to be said the record is voluminous in this case or that the abstract is deficient in other respects not mentioned, but the rule is the same in all cases and should not be relaxed. The point is raised by defendant in error that under the assignment of errors as made, and from the record as abstracted, no error authorizing a reversal appears and this point must be sustained. No error appearing the judgment is affirmed."

In *Phillips v. Benfield*, 249 Ill. 139, the court refusing to review the case on error affirmed the decree of the circuit court, saying:

"As the errors assigned upon the record are not made to appear by the abstract of the record filed in this case, the decree of the circuit court will be affirmed."

Many decisions of the different Appellate Courts might be cited to like effect, but we prefer to rest our judgment upon the authoritative expressions of the Supreme Court, many more of which exist. The want of a proper abstract is not raised by appellee. But supported by numerous decisions we make the point *sua sponte*. At the present term we have made a like decision in equity suit (Gen. No. 7948, *Bryden v. Wolfley* citing cases.) There is here no element of oppression demanding that we shall do what counsel are required by the law of procedure to do. For want of a proper abstract

enabling us to ascertain whether
the alleged errors are well assigned, the judgment of
the Circuit Court of Fulton County is affirmed.

Affirmed.

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Gen. No. 7948

Agenda 47.

October Term, 1925

Mary Bryden, Appellee

vs.

Robert H. Wolfley, Appellant.

Appeal from the Circuit Court of Maconpin County.

CROW, J.

Mary Bryden, the appellee, filed her bill in equity for relief against Robert H. Wolfley, appellant. The prayer of the bill as stated in the brief of appellant, was "for the creation of an equitable lien upon the premises which were the subject of the contract, for the money paid to Wolfley and for interest thereon and costs." The brief states the cause was referred to the master in chancery to take evidence and report his conclusions thereon. That the report of the master having been made, objections to it were filed; that they were overruled and were by the court ordered to stand as exceptions before the chancellor. The chancellor made a decree for a lien and defendant has appealed to this court, assigning twelve errors, some arising out of proofs and others out of the alleged inherent defect of the bill to confer jurisdiction.

To secure the review of a judgment or decree of an inferior court on appeal or on error, there must be a transcript of the record, an abstract of the record, and a brief to which may be appended an argument of counsel. But they are distinct steps in the procedure of review, and are required to be prepared in conformity with the rules of practice of the reviewing court. Rule 9 of this court relates to the transcript of the record, its contents and method of preparation. It requires authenticated copies of the process, pleadings, verdict, judgment or decree, bill of exceptions, certificate of evidence or report of the master and appeal bond. Rule 22 relates to the abstract of the record, its contents and method of preparation. So far as now material, it provides:

"In all cases the party bringing a cause into this court shall furnish a complete abstract or abridgment of the record therein, referring to the appropriate pages of the record by numerals on the margin, and shall cause such abstract to be printed in a neat and workmanlike manner. **** The abstract must contain a complete index, alphabetically arranged, giving the page where each pleading, exhibit, or other document may be found. **** The defendant's counsel shall be permitted, if he is not satisfied with the abstract or abridgment furnished by the plaintiff's counsel, to furnish such further abstract as he shall deem necessary to a full understanding of the merits of the case."

It has often been said by the Supreme Court and repeated by the Appellate Courts of this state that an index is not an abstract. **Davis v. Strauch**, 182 App. 451; **Starrs v. Terry**, 130 App. 538; **Barber v. Mellish-Hayward Co.** 209 App. 299. The pleadings must be set out as the rule requires. **Dunlap v. Trainmen**, 214 App. 376; **Higley v. Dean**, 168 Ill. 266; **Hayes v. Geessens**, 207 App. 149; **Christy v. Elliott**, 216 Ill. 31; **Kuhel v. Sterling**, 164 App. 371. The requirement of the rule that the abstract shall be indexed so completely ought to be sufficient warning that the abstract must be more than a mere index. The provision of the rule for an additional abstract is not license of laxity in observing the rule. The abstract is a pleading of the appellant or plaintiff in error. **McGovern v. Chicago**, 202 App. 139. If he has not stated enough in such pleading to manifest the errors relied on, his adversary is under no obligation to aid him. But it sometimes occurs that the abstract is misleading by reason of omission, to the detriment of appellee. He may file an additional abstract to protect himself and under the rule have the cost of it taxed to his adversary, if actually necessary.

The foundation of a suit in equity is a bill, stating the material facts from which the complaining party conceives his right to demand relief arises. Only facts must be stated. Upon an inspection of the bill upon demurrer, and applying to the facts some legal or equitable principle not expressed, but implied, as being in the mind of the pleader, if a ground for equitable relief appears an answer is required. In default of an answer, the bill is taken as confessed and relief may be awarded without more ado. But

the soundness of the bill conceded, the equity appearing upon its face may be overcome by denial of the facts or by statement of other facts avoiding or averting the conclusion of its equity. No case in equity can be determined without a bill.

Looking at the abstract of the record in this case for the purpose of ascertaining the facts upon which complainant demanded relief in the circuit court, and the proceedings thereon, we find them as abstracted:

“Bill of complaint filed in this cause by complainant on the 23rd day of May, A. D. 1923, on the chancery side and entitled, Bill for Relief.”

“Order of court referring cause to master in chancery to take evidence and report the same to the court with his conclusions.”

“Answer filed by the defendant.”

That a bill was filed is admitted by appellee. The circuit court therefore had jurisdiction of a chancery proceeding. That appellant answered the bill is also admitted. It is contended the court had not jurisdiction of the particular controversy. Whether it had, and whether the bill was supported by the evidence, we cannot say, for the bill is not set out in the abstract. Whether the answer admitted the averments of the bill; or what averments it admitted, if any, and what it put in issue we will not say for it is not set out in the abstract. Whether the decree conforms to the bill and is responsive to the issues, we are not advised for the same reason. Appellant alleges error and must make it appear in the manner designated by law and rules of procedure, by the abstract. This has not been done.

Error not appearing, the decree of the circuit court of Macoupin county is affirmed.

Affirmed.

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242 I.A. 655

Gen. No. 7940

Agenda No. 57

October Term, 1925

Michael E. Bates, Appellee,

v.

A. B. Zybell and Cory H. Zybell, Appellants.

Appeal from Champaign County Circuit Court.

SHURTLEFF, J.

This is an appeal from a judgment of the Circuit Court of Champaign County entered against the appellants for \$15,640 and costs in favor of appellee, at the January Term, 1925.

Appellee filed his declaration, consisting of one count, against the appellants in an action to trespass on the case for fraud and deceit, and set forth that on January 10, 1924, he was the owner, as joint tenant, of an undivided one-half interest in an apartment building in Champaign, Illinois, known as the Woodcock Flats; his wife, Inez Bates, likewise having an undivided one-half interest, and which premises were subject to a mortgage encumbrance of \$22,121.

The declaration further avers that the appellant Cory H. Zybell, on May 22, 1923, was seized and in possession of 840 acres of land in Mille Lacs County, Minnesota, which land was of the fair cash market value of about \$1,000; that the appellant Cory H. Zybell, meaning and intending to cheat and defraud any person to whom he might thereafter sell the promissory notes hereinafter referred to fraudulently executed a warranty deed conveying the said premises in Minnesota to one John H. Meyers, and fraudulently procured the said John H. Meyers and Frances Meyers, his wife, to sign a promissory note for \$21,500, and also fraudulently induced the

said John H. Meyers and Frances Meyers, his wife, to execute a mortgage deed conveying the said premises in Minnesota to the appellant Cory H. Zybelle for the purported purpose of securing the payment of the \$21,500 note and the interest thereon, "he, the said Cory H. Zybelle, then and there knowing that the said John H. Meyers and Frances Meyers had no means with which to pay the said promissory note, or any part thereof, or with which to purchase the said premises," and well knowing the said note was worthless in so far as the same exceeded the value of the Minnesota real estate, all of which actions and deeds on the part of the appellant Cory H. Zybelle were intended by him to be for fraudulent and deceptive purposes, and to enable him to make it appear a part of a legitimate transaction and to aid him in defrauding and deceiving any person to whom he might thereafter undertake to sell the said note and interest coupons.

The declaration further avers that the appellants, meaning and intending to cheat and defraud the appellee, and to induce the appellee to believe that the said promissory note and coupons thereto attached were of the fair market value of the face thereof, represented to the appellee that the said principal note and coupons had been received by the appellant Cory H. Zybelle in a transaction in which the said Cory H. Zybelle had traded the said real estate in Minnesota to the said John Meyers for a farm located in Iowa, consisting of 160 acres of the value of \$300 per acre, and had received in addition thereto, as part of the consideration of the exchange, the said promissory note and coupons, all of which representations were false and were fraudulently made by the appellants.

The declaration further charges the appellants falsely and fraudulently represented to the appellee that the Minnesota real

estate was worth approximately \$70,000; that the 840 acres was then and there good tillable land, all under cultivation or capable of being cultivated, and of the fair market value of \$100 per acre; and further charges that the appellants represented that the said Cory H. Zybelle had lived on the land for a period of two years, and that all of these representations were relied upon and believed by the appellee and he was induced to purchase the said promissory note and coupons, and conveyed his undivided interest in the Woodcock flats in consideration thereof.

The declaration further charges that all of the foregoing representations were in fact false and charges in addition thereto that the "said promissory note, together with interest coupons attached thereto, signed by the said John H. Meyers and Frances Meyers, was then and there of the fair cash market value of, to wit, \$500," by means of which the appellee was defrauded out of the difference between the fair cash market value of the said note and interest coupons attached and the amount which the same were then and there represented by the appellants to be worth."

Appellants pleaded the general issue and there was a trial by jury and a verdict and judgment for appellee in the sum of \$15,640 and appellants have brought the record to this court for review.

The testimony on the trial is conclusive that the 840 acres of land in Minnesota was cut over timber lands, portions of which were covered with logs and swamp and none of which had ever been tilled. There was standing timber on the tract of the value of \$150, and Meyers testified that he had never been on the tract but that he had been within one mile to the east line; that he purchased the tract from Appellant Cory Zybelle at twenty-five dollars per acre and gave a mortgage back to appellant for \$21,500. The mortgage would, therefore, be \$500 more than the purchase price

of the land. Meyers paid nothing for the deed and it was contended that Cory Zybelle paid him twenty-five dollars to accept the deed and execute the mortgage and notes. Zybelle paid Meyers twenty-five dollars or thereabouts, in cash, which Meyers testifies was paid to him to cover an automobile repair bill, although he testifies also that he was a mere helper or employee in a garage. Appellee presented many witnesses who testified that the lands were worth not to exceed five dollars per acre in value, while appellants' witnesses placed the value of the lands from twenty-two to twenty-five dollars per acre.

We have gone over the record and read the testimony and we are of the opinion that the testimony amply supports the verdict and the judgment should be affirmed unless substantial errors appear in the record. Appellants assign error because the court refused to sustain appellants' challenge for cause of the juror Evans who was afterwards challenged peremptorily by appellants and excused. The full testimony of the juror on his *voir dire* is set out and appellants assign error because they were later obliged to accept a juror whom they had intended to excuse peremptorily, but could not do so as they had exhausted their peremptory challenges. There was no record kept by the court or the reporter and incorporated in the bill of exceptions showing appellants' use of peremptory challenges and this assignment of error is only made to appear by the affidavit of counsel attached to the motion for a new trial. It is never proper to preserve by affidavits in a bill of exceptions a statement of matters that have occurred in the presence of the court. (*Peyton v. Village of Morgan Park*, 172 Ill. 107; *People v. Nail*, 242 Ill. 296; *Mayes v. People*, 106 Ill. 314; *People v. Strauch*, 247 Ill. 228.) In the last case cited it was held: "Counsel for the plaintiff in error further urge that the court refused a challenge for cause against one of the talesmen

who was afterward peremptorily challenged, and that plaintiff in error during the trial exhausted all his peremptory challenges. At the time this juror was excused the plaintiff in error still had several peremptory challenges, and it does not appear that an undesirable juror was forced upon him. This question is attempted to be preserved in the record by an affidavit in support of the motion for a new trial. Under the authorities heretofore cited these alleged occurrences, being shown only by affidavits, are not properly preserved for review here."

Appellants assign error on the ground that the court permitted the witness Gray, for appellee, to testify to his opinion of the expense of removing the stumps and brush from the land and draining same. It is insisted the witness did not properly qualify himself as an expert witness or as competent to express an opinion upon such subjects. The witness was an engineer and contractor and had lived in Mille Lacs County, Minnesota, fourteen years, practicing his profession and taking and carrying out contracts of a similar nature. He testified that he had had experience in removing stumps, brush and trees from land such as were growing on the lands in controversy, and that he had constructed ditches as a contractor and drained lands in that vicinity. The witness had also made a careful survey of the entire tract and found places where a pole could be inserted in the marsh many feet in depth. He expressed an opinion as to the cost of clearing and draining certain portions of the land and he was certainly competent for the purpose. That the witness was ignorant of the fact that the United States Government furnished dynamite free with which to assist in clearing such lands and the salvage value of stumps taken out, only tends to show that the witness was possessed of the ignorance which pervades the general public, and upon which subject this record throws no light. It cannot be contended that

the subject matter was not material as appellants offered witnesses who testified upon the same subject. There was no error in this regard.

Appellants further contend that there is no evidence in the record tending to show that Frances Meyers, wife of John H. Meyers, both of whom signed said notes, was not a woman of means and able to pay said indebtedness, and therefore appellee was not damaged. There are facts and circumstances in the record which rebut such an assumption and neither of the makers of said note and mortgage have ever made a payment of principal or interest upon the note and defaulted in the payment of taxes. As to whether Frances Meyers had any property or not, the witness Anderson, who knew her, "couldn't say." The witness LeMay, of whom the same inquiry was made, answered: "No, I don't know whether she has any." The witness LeMay further testified that he knew the general reputation of Frances Meyers in the locality where she resided as to whether she was the owner of any property and that that reputation was that she had no property. Later, on cross examination, the witness could not remember the name of any particular person living in Foreston, where the Meyers resided, that had discussed the financial standing of Mrs. Meyers with him, and upon appellant's motion the testimony of LeMay on that subject was stricken out. The motion should have been disallowed and the testimony permitted to stand for what it was worth.

It is plain from reading the entire testimony that appellants never considered Frances Meyers signature to the papers as obligatory other than as the wife of John H. Meyers. She never knew the amount of the indebtedness and never saw the notary who purported to take her acknowledgment to the mortgage. The charge that Frances Meyers was not financially responsible, being a

negative averment which could easily be disproved if it was not true, and it being to the interest of appellants to disprove such averment, makes very slight evidence or even inference from the proofs sufficient to establish that fact, where there are no proofs offered to the contrary. (**Prentice v. Crane**, 234 Ill. 311; **Cole v. Cole**, 153 Ill. 587; **Ryan v. Hamilton**, 205 Ill. 203.) In **Prentice v. Crane**, *supra*, it is held:

“To prove the falsity of the representation that Mrs. Crane left a will devising her property to Crane involved the proof of a negative—that is, proof that Mrs. Crane left no such will. ****

“The effect of a negative form of issue in cases involving charges of fraud is not to relieve the party making such charge of the burden of introducing any proof, but the law will be satisfied with a less quantity of proof; and this is particularly so where there is the concurring circumstance of the facts being within the knowledge of the adversary party. Evidence which renders the existence of the negative probable may be sufficient in the absence of proof to the contrary (*Jones on Evidence*, Sec. 178. In **City of Beardstown v. City of Virginia**, 76 Ill. 34, in discussing the quantity of proof required where the issue is negative, this court, on page 44, said: ‘Full and conclusive proof, however, where a party has the burden of proving a negative, is not required, but even vague proof or such as renders the existence of the negative probable, is in some cases sufficient to change the burden to the other party (**People v. Pease**, 27 N. Y. 45; **Commonwealth v. Bredford**, 9 Metc. 268; 1 *Greenleaf on Evidence*, sec. 80).’ This rule is again approved by this court in **Vigus v. O’Bannon**, 118 Ill. 334. In **Behrens-meyer v. Kreitz**, 135 Ill. 591, this court, speaking in reference to the presumption that an alien-born citizen has been naturalized from the fact that he has voted, on page 627 said: ‘But that since the presumption of the law involves the

necessity of proving a negative, the difficulty of so doing requires that slight proof ought to be sufficient to shift the burden."

Further, it may be said that appellants cannot take advantage of any want of proof as to Frances Meyers financial condition where competent and proper proof on that subject has been stricken out upon their motion. (*Owen v. Crumbaugh*, 228 Ill. 408; *Hahl v. Brooks*, 213 Ill. 134; *Nebergall v. The Prudential Ins. Co.* 193 Ill. App. 139.) The error based upon this assignment does not warrant this court in reversing the judgment.

It is next contended by appellants that the court erred in refusing to permit evidence to be introduced as to the value of the Woodeock flats. There was no issue made as to the value of this property or appellee's undivided one-half interest therein. Appellants traded the \$21,500 note and mortgage for appellee's property and represented the note to be worth its face value. There is no plea of set off nor any plea averring fraud on the part of appellee in the exchange of his property. There was, therefore, no error in the ruling of the court. (*Barnes v. Barnett*, 188 Ill. App. 32; *Drew v. Beall*, 62 Ill. 168; *Haldeman v. Schuh*, 109 Ill. App. 265; 23 Corpus Juris, 92 and 94.) In *Barnes v. Barnett*, *supra*, the court held: "It is contended that the court erred in refusing to permit appellants to prove the value of the lands conveyed to Barnett by appellee.

"There was no issue before the court on that question; the only question was the fraud and deceit in the conveyance of the Reynolds land to appellee. The evidence offered was immaterial and not relevant to the issues in the case for the reason the averment, with the proof, is that appellants took appellee's land at an agreed price, concerning which there is no allegation of fraud."

In **Drew v. Beall**, *supra*, the court held: "The defendant had received the consideration agreed to be paid by the plaintiff, and the latter was entitled to have such a tract of land as this was represented to be, and if he has not got it, his damages, by reason of not getting it, and the proper measure of damages, we think, is the difference between the actual value of the land and the value of such a piece of land as this was represented to be by the defendant."

Corpus Juris lays down the rule: "The measure of the damages sustained by the purchaser, where a purchase has been induced by fraud, is, according to the weight of authority, the difference between the real value of the property purchased and the value which it would have had, had the representations been true. This rule is based upon the theory that a defrauded party is entitled to the benefit of his bargain and should be placed in the same position that he would have occupied had the false representations upon which he acted been true. Damages established according to this rule are not, by the courts applying it, regarded as speculative, and the application of the rule will not be prevented by the difficulty which may be presented in estimating the value which the property would have if as represented. This measure of damages applies without regard to the price paid, and, in the case of an exchange, without regard to the value of the property given in exchange by the party defrauded."

Appellants assign error upon the giving of each of appellee's ten instructions except the eighth, and in setting out portions of the instructions have argued at considerable length as to their respective deficiencies. We have examined each of these instructions and the authorities in their support, and in the opinion of this court the instructions fairly presented to the jury the law

applicable to the case. It would serve no useful purpose to enter into a discussion of these instructions in detail. Appellants' fourth refused instruction, that statements and representations made by a seller to a purchaser of land, as to the value of such land, are mere matters of opinion only and even though made and false do not alone constitute grounds for an action for damages, is not applicable to the facts in this case.

Appellants' seventh refused instruction, of which complaint is made, singled out the plaintiff and his interest in the case and advised the jury that they should take this into consideration in determining the credibility to be given to his testimony. This instruction was properly refused. (*C. & E. I. Ry. Co. v. Burridge*, 211 Ill. 13.)

Appellants' sixteenth and seventeenth instructions advised the jury that one of the material allegations in the declaration was that Frances Meyers had no means wherewith to pay the said promissory note and unless the plaintiff had proven this allegation by a preponderance of the evidence the jury should find for the defendants. The instructions were properly refused.

Appellants assign error upon the statements of counsel for appellee in arguing the case to the jury that they were prejudicial and inflammatory and outside the proper line of argument. We have read the entire record of such statements as preserved, and while counsel doubtless once or twice misquoted evidence and was corrected by the court and on one occasion was quite vituperative towards the defendants, we find nothing in that regard that warrants a reversal of the judgment. The record is not free from slight errors but for a case involving the issues that were litigated, and considering the length of the trial, the record is free from any substantial error that would warrant a reversal of the judgment

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of the Circuit Court of Champaign County. The judgment is therefore affirmed.

Affirmed.

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General No. 7957

Agenda 58

October Term A. D. 1925

Elsie L. Bennett, Appellant.

vs.

Ralph S. Bennett, Alice S. Bennett and the State

Bank of Blue Mound, Appellees

Appeal from Christian

NIEHAUS, P. J.

In this case the appellant, Elsie L. Bennett, filed a bill for divorce against her husband Ralph S. Bennett, in the circuit court of Christian county. The right to a divorce is based upon charges of extreme and repeated cruelty. As a matter of incidental relief, the complainant prays to have a conveyance of one-fourth interest in 200 acres of land in Christian county, inherited by her husband from his father, set aside and annulled. The complainant alleges, that she was induced to join in the conveyance of this one-fourth interest by her husband to his mother, Alice S. Bennett, under a promise that the consideration of \$3000 for the conveyance should be held for the account of both; and to establish a home; and to operate a farm which the husband claimed to have leased; but that her husband did not keep this promise, and disposed of the proceeds of the sale; and put the same beyond reach of the complainant. The bill also alleges with reference to this conveyance, that it was not made in good faith; but no facts are stated to support this allegation. The bill prays, for an injunction, which was granted; and the court ordered a temporary injunction restraining the appellee from selling any personal property or real estate involved in the controversy. A hearing was had before the court, and thereupon the court entered a decree, finding the issues in favor of the appellee, and against the appellant; and dismissing the bill for want of equity, and dissolving the injunction. This appeal is prosecuted from the decree.

The record of the evidence discloses, that the evidence

concerning the alleged acts of extreme and repeated cruelty, set forth in the bill of complaint, is very conflicting. The question, whether the appellant was entitled to a divorce on the grounds set forth in her bill of complaint, involved the determination of whether she or her husband told the truth concerning their marital difficulties, and also passing on the credibility of a number of witnesses. There is evidence which apparently corroborates the appellant; and apparently more evidence which corroborates the husband concerning alleged acts of extreme and repeated cruelty. It is well settled in a case of this kind, where the evidence is conflicting the finding of the chancellor who heard the witnesses, will not be set aside by a court of review unless it is clearly against the weight of the evidence. **Gerber v. Gerber** 155 Ill. 219. **Hudson v. Hudson** 222 Ill. 527. We cannot justly say that the finding of the chancellor in this case was against the weight of the evidence.

The averments of the bill, and the incidental relief prayed for are based specially upon the failure to carry out certain promises which are alleged to have been made to the appellant by her husband, namely, to use the proceeds of the sale amounting to \$3000.00, for the account of both; and to establish a new home; and to use the money to operate a farm, which she alleged the husband said he had leased. The failure of the husband to keep these promises about the disposition of the proceeds of the sale, cannot be regarded as a legal ground to set aside the sale which involves the rights of a third person, where the third person is not a party to the promises. It is not averred in the bill; nor does it appear in the proofs, that the appellee Alice S. Bennett, the purchaser of the interest in question, had any knowledge of or was a party to any promises alleged to have been made by appellant's husband; nor, that the sale and purchase in whole or in part was made on the basis of such promises; nor that the purchaser in any way became bound or obligated to see that the alleged promises were carried into effect. Whether or not the appellant signed the conveyance of her husband's interest with him, on the strength

of the alleged promises, was a question of fact, about which the evidence is also in conflict; and this feature of the case rests upon the same basic principle already referred to, namely, that the finding of the chancellor, where it determines a fact, about which there is a conflict in the evidence, should not be set aside except for well defined reasons. However the incidental relief necessarily fails where the principal relief prayed for is properly denied. The decree is therefore affirmed.

Affirmed.

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242 I.A. 655

General No. 7958

Agenda 3.

April Term, A. D. 1926

The People of the State of Illinois, Defendant in Error
vs.

Jesse Myers, Plaintiff in Error

Writ of Error to Clark.

NIEHAUS, J. P.

In this case the Plaintiff in Error, Jesse Myers, was tried and convicted in the county court of Clark county on an information filed against him by the State's attorney, containing two counts. The first count charges the Plaintiff in Error with illegally transporting intoxicating liquor; and the other count charges him with operating a motor vehicle, while intoxicated, on a public highway in Clark County. The first count was based upon a violation of the Prohibition Act, and the charge in the second count is a violation of the Motor Vehicle Act. The Plaintiff in Error was found guilty under both counts, and sentenced under both counts. A writ of error is prosecuted from the judgment of the conviction.

Various errors are assigned to reverse the judgment. It is contended that the court should have sustained the motion to quash the information. It appears however, that each of the counts charges an offense substantially in the language of the statute, and must be regarded as legally sufficient. The motion to quash was therefore properly overruled. It is also contended, that an amendment was made to the second count of the information; and it is contended that the count as amended was not sworn to. But the abstract discloses, that the amended count was sworn to, and therefore this question is not before us for determination. It may be pointed out however, in reference to this contention, that apparently no question was raised or objection made to the amended count on that ground in the trial court, and the objection must therefore be considered waived. Objections of this character cannot be raised for the first time in a court of review. **People v.**

Jawloy 198 Ill. App. 88; **People v. Grady** 217 Ill. 490. It is also contended that the trial court erred in not compelling the People to elect, concerning which of the two counts they relied upon for a conviction; that such election should have been enforced because the offenses charged in the counts were based on different statutory enactments; one under the Prohibition Act, and the other under the Motor Vehicle Act. It is sufficient to say in reference to this point, that the evidence clearly shows, that the two offenses charged, which were misdemeanors, grew out of the same transaction. Under the circumstances, it was not error to deny the motion. **People v. Pelinski** 293 Ill. 382. Error is also assigned on two instructions given for the People, namely the second and the eighth instructions. The second instruction is as follows:

The Court instructs the jury in the language of the Statute as follows: "After the going into effect of this Act, the possession of liquors by any person not legally permitted under this Act to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this Act. It shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only, provided such liquors were lawfully acquired and are for the use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed and used.

We are of opinion that this instruction places the burden of proof upon the defendant to show that the liquor alleged to have been in his possession, was legally in his possession. The instruction is in conflict with the principles enunciated in **People v. Tate** 316 Ill. 52. The eighth instruction is as follows:

The Court instructs the jury that any person has the right to purchase and have in his possession intoxicating liquor for medical purposes, if the same is purchased on prescription issued to such person by a qualified physician holding a permit to issue prescriptions for such a purpose, provided the liquor is purchased from a registered pharmacist, local registered pharmacist or registered assistant pharmacist designated in a permit and duly licensed under the laws of this state to compound and dispense medicine prescribed by a duly qualified licensed physician.

But when such person has thus acquired intoxicating liquor, he cannot use the same as a beverage and if you find from the evidence beyond a reasonable doubt that the defendant did purchase intoxicating liquor as above set forth, and if you further find from the evidence beyond a reasonable doubt that the defendant used the same as a beverage, that he was transporting same without a permit from the Attorney General while he was thus using it as a beverage, then it is your duty to find him guilty of transporting intoxicating liquor.

The instruction purports to inform the jury, that if a person acquires liquor legally, from a registered pharmacist on a prescription of a qualified physician holding a permit to issue such prescriptions, and has such liquor as a beverage instead of as medicine while traveling along the public highway, that he would be guilty of illegally transporting such liquor under the Prohibition Act. We are of opinion that the provisions of the Prohibition Act concerning its transportation were not intended to cover liquor which a person has consumed, whether as a medicine or a beverage. The instruction was erroneous. It was also error for the court to allow the liquor which had been offered in evidence at the trial to be taken to the jury room.

People v. Elias 316 Ill. 376.

For the errors indicated, judgment is reversed and the cause remanded.

Reversed and remanded.

Benjamin F. Trimble, et al., Appellees,

v.

Spurgeon Marney, et al., Appellants.

242 I.A. 656

Appeal from the Circuit Court of Adams County

Shurtleff, J.

This is an appeal from a decree entered upon a jury verdict, finding that an instrument presented was not the last will and testament of Henry Weber, deceased. Testator executed three wills. The first was published May 11, 1917, and provided for the payment of all of his just debts and the residue and remainder of his estate was bequeathed to the St. Aloysius Orphan Society of Quincy, Illinois, attested in due form. The second instrument was executed in due form August 5, 1922, and bequeathed all of testator's possessions in the Soldiers and Sailors Home at Quincy, Illinois, including any cash in testator's possession or on deposit in his name in the bank in the Illinois Soldiers and Sailors Home at Quincy to Appellee Benjamin F. Trimble, said will and testament being properly attested. The third will, the instrument in question, was executed May 2, 1923, and after providing for the payment of his debts, willed and devised all of testator's estate to Appellants Spurgeon Marney and his wife, Anna Marney, of Quincy, and Appellant Johnson was named as executor of the third and last

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will so executed and it was attested in due form.

Henry Weber, the testator, died June 22, 1923, leaving an estate, consisting of nine hundred dollars, on deposit in the Illinois Soldiers and Sailors Home, and fourteen hundred dollars on deposit in the Ricker National Bank, both of Quincy. The three wills were filed with the clerk of the Probate Court of Adams County and upon a hearing in that court the last will, executed May 2, 1923, was admitted to probate as the last will and testament of Henry Weber, deceased, and the earlier executed instruments were not probated, though the particular order entered in that court as to said earlier wills is not shown in the record before us, if there was any order made.

Appellees filed their bill in the Circuit Court of Adams County, charging that the said Henry Weber, at the time of the execution of said instrument in writing, dated

May 2, 1923, was not of sound mind and memory, but on the contrary was in his dotage and that his mind and memory were so impaired as to render him wholly incapable of making any fair and proper distribution of his estate. The bill also charged undue influence on the part of Spurgeon Marney and Anna Marney, his wife, appellants and legatees under the will. From the verdict and decree of the Circuit Court of Adams County appellants have brought the cause to this court by appeal and assign various errors upon the record.

It is first contended that appellees, being the legatees under the two former executed instruments, denied probate by the probate of the instrument in this cause, do not come under the class termed "party interested" that entitles them or either of them to file a bill to contest this will. The contestants are neither heirs at law or of kin to the testator.

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In the case at bar appellees set out the two prior wills in their bill of complaint and made proof of the due execution of the same before the court to establish that they were parties interested in this cause. No complaint is made by appellants as to the form of the prior wills or as to the sufficiency of the proofs. The question here raised was under consideration in **Adams v. First M. E. Church**, 251 Ill. 270, and as to a complainant in the same situation that appellees are in in this case, the court said: "It is not denied that he would have had such a right (to present a bill of complaint) but for the order of the probate court denying probate of the will in his favor." The court further held: "The judgment of the probate court on the merits in allowing or disallowing any will to probate is final and conclusive unless reversed on appeal (In the Matter of Storey, 120 Ill. 244); but where probate is denied because of the existence of a subsequent will the judgment is not conclusive if the subsequent will is set aside. The case of **Bardell v. Brady**, 172 Ill. 420, was the same, in principle, as this, and it was not there considered that the probate of the revocation and setting aside of the probate of the will deprived the parties claiming under the will of the right to contest the revocation by a bill in chancery. The circuit court could not admit either will to probate, the exclusive original jurisdiction for that purpose being in the probate court. (**Beatty v. Clegg**, 214 Ill. 34.) But the circuit court did have jurisdiction to set aside the second will, which revoked the first one. The complainant had a substantial interest in

the subject matter of his bill, and the court did not err in the ruling."

In the case at bar no order of the probate court is shown denying probate of the former wills. The order admitting to probate the will of appellants is, however, in effect a denial of

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probate of the former wills, and if the complainant in the case of **Adams v. First Methodist Church** had a substantial interest in the subject matter of his bill, we must hold that appellees, complainants in this suit, had a substantial interest in this cause.

Appellants assigned error upon a line of questions submitted by appellees to numerous witnesses produced in their behalf. The most of these witnesses had had no conversation with the testator about his property matters or his family connections and had never transacted any business matters with the testator or testified to any transactions of business by the testator, or that they had any knowledge of testator's capacity to transact business matters of any kind. We take for example the testimony of their first witness, Mattie M. Rose, which in part is as follows:

"Question. I will ask you whether in your opinion in cottage 12, after he took sick this time, and in the hospital, whether he would be able to appreciate the nature and extent of his property?"

This was objected to by counsel for proponents on the ground that it is not a proper question at this time and is calling for a conclusion of the witness. The court overruled the objection; excepted to by counsel for proponents.

"Answer: I do not think that he was conscious of the amount of money or property that he had, for three weeks before he left my cottage or after he went into the hospital."

"Question: I will ask you whether, after this sickness came on him in cottage 12, and after he went into the hospital, whether in your opinion he had mind enough to know and appreciate the natural objects of his bounty."

Counsel for proponents objected to the question on the ground that it is a question for the jury to decide and is one of the

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elements of fact in the case and the question calls for conclusion of the witness.

"Court: That is true, but this woman is giving her

opinion and not stating it as a fact."

Objection is overruled. Counsel for proponents objected to this ruling.

"Answer: No, sir, I do not."

"Question: I will ask you whether, in your opinion, after this sickness came on and after he was in the hospital, he would be able to transact ordinary business?"

Counsel for the proponents objected to the question for the same reason as assigned to the last above named question. Court overruled the objection.

Counsel for proponents objected to the ruling.

"Answer: No, sir, I do not think he was capable."

It is objected that these questions and answers were improper, pure conclusions and called for an opinion upon the ultimate facts which were to be determined by the jury. In **Baddeley v. Watkins**, 293 Ill. 404, in which the court had under consideration similar interrogatories and an additional third interrogatory in substance, "whether or not in your opinion she had sufficient mind and memory to recall to mind her property and to make disposition of it understandingly, according to some plan she had formed in her mind," the court said:

"It was clearly error to permit the witnesses to express an opinion in answer to the third question of the series. This court has repeatedly held that it is error to ask a witness whether or not the testator was mentally capable of making a will. The practice of splitting this ultimate question into its several parts and permitting the witness to express opinions on the several

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parts is just as vicious as the practice we have already condemned. In **Baker v. Baker**, 202 Ill. 595, we held that objections were properly sustained to questions "whether or not the testator, at the time of making the alleged will, had sufficient mind and memory to understand the will in question," "whether or not he was able to carry in his mind and memory the nature and extent of his property," and "whether or not he was able to understandingly execute a will." In **Garrus v. Davis**, 234 Ill. 326, we held that a witness, expert or non-expert, might give his opinion as to the condition of the testator's mind and whether testator was sane or insane, but that the witness ought not be permitted to assume to advise the court and jury as to the degree of mental capacity necessary to enable the testator to make a valid will. In **Wetzel v. Firebaugh**, 251 Ill. 190, we said: 'Questions put to witnesses wheth-

er the testatrix was able to understand the business in which she was engaged when she made this will, or able understandingly to execute it, simply called for conclusions of the witnesses as to testamentary capacity and amounted to an attempt to put the witnesses in the place of the jury and allow them to determine the very question which the jury had been sworn to try."

The court said further in the same case (page 405): "Where the witness has detailed a conversation with the testator regarding the nature and extent of testator's property and regarding the natural objects of testator's bounty, it would not be reversible error to permit the witness to answer the first two questions of the series." And again the court said in this case (page 403): "Where witnesses have had no conversation with the testator regarding the property of the testator, it is clearly error to permit the witness to express an opinion on whether or not the

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testator was able to know what property he owned. It is not an opinion expressed from knowledge but it is a purely a guess or supposition of the witness."

The vice of this line of questioning becomes apparent upon reading the eighth instruction given in behalf of appellees. This instruction informed the jury that the testator to be of sound mind and memory "must, at the time he signs it, be capable of knowing what his property is, who are the natural objects of his bounty and be able to understand the nature, consequence and effect of the act of executing his will. All of these elements must concur and the absence of any one of them will render such person incompetent to make a valid will, although all the other elements may be present; and if you believe from the evidence that Henry Weber *** was not capable to comprehend any one of the above mentioned requirements, then you will find against the validity of the said alleged will."

We are of the opinion that this line of questioning, as it pertained to the deceased's unsoundness of mind, was error.

Appellants assign error on the ground that appellees produced a witness, Rose, who testified, over objections of appellants, that Appellant Spurgeon Marney came to the witness and inquired for Mr. Trimble and waited to see him and stated that, "Mr. Weber (testator) is very crazy over there now and he wants Trimble to come over and see if he can't do something to quiet him down or do

something for him." It is insisted that when more than one person is substantially interested in the devises and legacies under a will and testament that the admissions of any devisee or legatee are not competent in the case. **McMillan et al v. McDill et al**, 110 Ill. 50; **Lyman v. Kaul**, 275 Ill. 22; **McCune v. Reynolds**, 288 Ill. 193. The interest of the legatees was not joint under

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this will, but Anna Marney, severally, took an equal interest in the estate with her husband. Appellees insist that the appellants did not raise this point in their objection, but objected to the testimony upon the ground only "that Marney is one of the interested parties in the last will and testament of Henry Weber, deceased, being a beneficiary and is incompetent to testify in any way in the case."

It is held that a specific objection to evidence, based solely on a particular point, is a waiver of objections to all other points not specified or relied on. **Village of Prairie du Rocher v. The Schoening-Koenigsmark Milling Co.**, 248 Ill. 61; **T. H. & I. R. R. Co. v. Voelker**, 129 id. 540. The testimony, under the objection as made, was competent as to Appellant Spurgeon Marney. **McMillan v. McDill**, *supra*. Simply because this appellant was an interested party, did not render his admissions incompetent. If he were the sole interested party there could have been no objection to the testimony. (**McMillan v. McDill**, *supra*). The general objection, therefore, as to his incompetency was not sufficient to exclude the testimony. (**Holroyd v. Millard**, 142 Ill. App. 401.)

Appellants assign error upon the giving of appellees' fourth instruction as to the preponderance of the testimony and advising the jury that "if the evidence as to the soundness of mind of said Henry Weber, at the time of executing said paper, writing or on the question of undue influence preponderates in favor of the contestants, **although but slightly**, then the jury would be authorized to find," etc. This was error. **Norton v. Clark**, 253 Ill. 557.

The errors pointed out substantially have relation to the issue of unsoundness of mind on the part of the testator, and in a case of different character and where the testimony was close

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and conflicting, would undoubtedly constitute reversible error. The issue of undue influence is also in the case. Some of the facts upon which that issue was based are as follows:

Testator was a soldier of the Civil War who went to the Illinois Soldiers & Sailors Home at Quincy in 1902. At that time he was seventy-two years old, which would make him ninety-two or possibly ninety-three years old at the date the will in question was executed. He seems to have remained at the Soldiers & Sailors Home from that time until April 30, 1922, when he was in the St. Vincent's Home at Quincy. For quite a while he was in cottage 20 of the Soldiers & Sailors Home and from about 1915 to May 18, 1920, he was in cottage 18, when he was transferred to cottage 12, which was a cottage for old and infirm members, and where he remained until February 27, 1923, with the exception of the time that he was in St. Vincent's Home. Within a month previous to February 27, 1923, he was taken with a serious illness in cottage 12, which resulted in a physical and mental breakdown, from which he never recovered. He became so bad that he could not dress himself or go to his meals, or the bath room alone, and he failed to recognize people and at times did not know where he was and left his money lying around on his bed or locker, and was unable to hold a connected conversation with people. This condition became so serious that on February 27, 1923, he was removed to the hospital in the Soldiers & Sailors Home where the evidence showed that his condition grew worse and that he was incurable. While he was in the hospital he was visited by a man by the name of John Guinn, who had known him in St. Vincent's Home, and with whom he had some negotiations looking toward his return to St.

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Vincent's Home. About this time Guinn went to see the Marneys and arranged for him to go to the Marney home. Guinn admitted on cross-examination that he might have told the Marneys that Weber wanted to get into St. Vincent's Home and offered to make a will in their favor if he would be admitted, and that very likely if the Marneys would take him in he would make a will in favor of them. Guinn and the Marneys arranged for Henry Weber to be received into their home and about noon on the morning of April 30, 1923, Guinn took Henry Weber out of the hospital and conveyed him by taxi to the home of the Marneys, where he

lived until he died in the month of June following.

Guinn testified that for about a week prior to April 30, 1923, he talked to testator about "getting him in at Marney's." Testator had no knowledge of appellants until he was taken there on April 30th. Guinn further testified that the testator was always anxious, ready and willing to make a will to anyone that "would take him in." Within a period of two days after going to appellants they hired a lawyer and had the will drawn in their favor. Appellants secured the witnesses and procured the will to be signed, sealed, witnessed and delivered. Appellant Spurgeon Marney was present at the attorney's office and left with him and the witnesses in an automobile for his home where the will was executed on the afternoon of May 2, 1923. Mrs. Marney was present at the time of the execution of the will and led the testator out and conducted him to a chair where he signed his name to the will. The will was drafted by Appellant Johnson, who is named as executor in the will which contains a clause directing that the executor be paid the sum of two hundred fifty dollars out of the estate for his services as executor. Appellant

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Johnson requested the witnesses, who had never seen or known the testator, to go to the Marney home and witness the will. They were in the home about twenty minutes and never saw the testator after that time. One of the witnesses testified he thought the attorney read the will at the home: the other testified he thought Johnson (appellant) said it was a will. The testator signed the will and the attorney, Johnson, then asked him if he wanted the witnesses to subscribe the instrument. There was a response of some kind that he did. There was no conversation with the testator except one of the witnesses inquired of him his age. Guinn's testimony is that in going to the St. Vincent's Home to see if they would "take the testator in" that the testator had told him that if they would take him back he would make a will in their favor. The record is absolute in this case that there was no such arrangement made with the Marneys, appellants. There is no testimony in this case tending to show that the testator initiated, planned or consented to being removed to the Marney's except the testimony of Guinn, his signature to the instrument, and his statement when he signed it. The offer testator is said to have made to St. Vincent's Home was in the nature of a contract to make a will for a consideration. The

will in controversy was based upon no consideration and the beneficiaries were total strangers until three days before the execution of the instrument. All of the beneficiaries were present when the will was executed and helped to procure its execution. The witness Guinn occupied a fiduciary relationship to the testator. From April 30th to May 2nd, 1923, the testator had lived in the Marney family and was being fed, nursed and cared for by them. This case comes squarely within the rule laid down in **Beach v. Wilson**,

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244 Ill. 422:

"Counsel for defendants in error argue that a fiduciary relation, under the law, does not exist unless it grows out of the relation of administrator and heir, guardian and ward, attorney and client or principal and agent. Such is not the law. In Pomeroy's Equity Jurisprudence (vol. 2, 3d ed. sec. 956.) that author, in discussing this question, says: 'Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded. It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal. It may be moral, social, domestic or merely personal.' The rule as thus stated has been repeatedly quoted with approval by this court. (**Roby v. Colehour**, 135 Ill. 300; **Thomas v. Whitney**, 186 id. 225; **Walker v. Shepard**, 210 id. 100; **Irwin v. Sample**, 213 id. 160.) The fiduciary relation exists between parties where there is a relation of trust and confidence between them,—that is, where confidence is reposed by one party and the trust accepted by the other. In **Mayrand v. Mayrand**, 194 Ill. 45, this court said (p. 48): 'The term fiduciary or confidential relation, as used in this connection, is a very broad one. It has been said that it exists, and that relief is granted, in all cases in which influence has been acquired and abused,—in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations

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and those informal relations which exist whenever one man trusts in and relies upon another. The only question is, does such a relation in fact exist?"

The same rule was announced in **Thomas v. Whitney**, 186 Ill. 230, where the court said: "There is a well defined distinction between undue influence arising from acts which the law deems fraudulent, and undue influence resulting from fiduciary relations existing between the parties. Certain transactions are generally those occurring between persons in some relation of confidence, one toward another. The presence of such relationship creates a presumption of influence, which can generally be rebutted by proof that the parties dealt as strangers, at arm's length; that no unfairness was used, and that facts in the knowledge of the one in the position of influence, affecting the matter, were communicated to the other." (27 Am. & Eng. Ency. of Law.—1st ed.—456.) Pomeroy, in his work on Equity Juris-prudence, (vol. 2), sec. 955,) says: 'Nothing can tend more to produce confusion and inaccuracy in the discussion of the subject (undue influence) than the treatment of actual undue influence and fiduciary relation as though they constituted one and the same doctrine.' The same author says (sec. 947): 'The term fiduciary or confidential relation, as used in this connection, is a very broad one. It has been said that it exists, and that relief is granted, in all cases in which influence has been acquired and abused,—in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another. The only question is, does such a relation in fact exist?"

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And the court further said: "Transactions between a party and one bearing a fiduciary relation to him: are upon his motion **prima facie**, voidable upon grounds of public policy, and the burthen of proof, the fiduciary relation being established, is upon the one receiving the benefit to show an absence of undue influence, by establishing the fact that the party acted upon competent and independent advice of another, or such other facts as will satisfy the court that the dealing was at arm's length, or he must show that the transaction was had in the most perfect good faith on his part and was equitable

and just between the parties, or, as some of the authorities say, that it was beneficial to the other party." To the same effect is **Mayrand v. Mayrand**, 194 Ill. 48; **Stahl v. Stahl**, 214 id. 137; 25 Corpus Juris, 1119; Pomeroy's Equity Juris. (3rd ed.) sec. 955.

In all such cases unless the party claiming the benefit of the contract shows, by clear and convincing proof, that he acted with perfect good faith and did not abuse or betray the confidence reposed in him, the presumption of fraud will require strong evidence to remove. **Stahl v. Stahl**, *supra*; **Zeigler v. Ill. T. & S. Bank**, 245 Ill. 197. In the latter case it is held: "To render such a transaction valid it is only necessary to show that the other party had competent and disinterested advice, or that he performed the act or entered into the transaction voluntarily, deliberately and advisedly, knowing its nature and effect, and that his consent was not obtained by reason of the power and influence to which the relation might be supposed to give rise." (Citing **Uhlich v. Muhlke**, 61 Ill. 499; **Herr v. Payson**, 157 id. 244.) No such showing was made by appellants in this case. The bill in

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the case at bar, being drawn with a double aspect, if either ground for setting aside the will is established, the decree should be affirmed. (**Snell v. Weldon**, 243 Ill. 519 and cases therein cited.)

Upon a consideration of the whole case it is the opinion of this court that substantial justice has been done and that the decree of the lower court should not be reversed for the minor errors occurring (**Ford v. Ford**, 257 Ill. 341) and the decree of the Circuit Court of Adams County is therefore affirmed.

Affirmed.

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Crow, P. J. dissenting:

Reluctantly I dissent from the judgment expressed in the majority opinion affirming the judgment of the Circuit Court. Under the circumstances attending the making of the contested will I would favor the affirmance if I were not convinced the contestants had no such interest as authorizes them to contest. If they have no such interest, then regardless of every other consideration they ought not to enjoy the fruits of their success. We have no authority to take property from one having no right to it and giving it to another having no right to it.

The right to contest a will is purely statutory. Statutory rights will not be enlarged beyond the provisions of the statute conferring them. The statute authorizing this proceeding provides "that if any **person interested** shall, within one year after the probate of any such will, x x x appear and by his or her bill in chancery contest the validity of the same" an issue shall be made. The issue was made in this case. But I think the parties filing the contest do not establish that they are **persons interested**, or, rather, the record shows they have none, and therefore they have no right to invoke the making of the issue. That question is at the threshold of this case.

By judicial construction in the most authoritative manner, the words "any person interested" are declared to mean: any person who has a **direct, existing, pecuniary** interest which will be detrimentally affected by the probate of the contested will. **Cassen v. Prindle**, 258 Ill. 11, 16; **McDonald v. White**, 130 id. 493; **Selden v. Illinois Trust & Savings Bank**, 239 id. 67; **Adams v. M. E. Church**, 251 id. 268. In **Cassen v. Prindle**, it was held that Maggie Cassen, being a remote grantee of an heir-at-law of the testator, was a person interested. In **McDonald v. White** it was held that the statute requiring the court to receive probate of a will offered for probate, without delay, to grant letters, and do all other needful acts, to enable the parties concerned to make settlement

as soon

as consistent with the rights of the persons interested, and the statute authorizing any person interested to contest the will, the words **parties concerned** mean those charged with the settlement of the estate, and **persons interested** mean those interested in the settlement—that is, those directly affected in a pecuniary sense by the settlement. It was further held that the words mean those having a present, pecuniary interest, and not those contingent or that may subsequently be acquired. It was further said that McDonald, the contestant, had at most only a bare right to establish title by successfully contesting the will. In **Adams v. First M. E. Church**, it was held that the later will having been admitted to probate after probate of an earlier will had been denied on the ground the later operated as a revocation of the first, the beneficiaries under the former were **parties interested** and might contest. The reason was, of course, they were direct pecuniary losers, because, notwithstanding some defect in the execution of the later will, it was admitted to probate, the first was denied probate. That case does not support this. In this there was no finding or decree as to the first wills.

What direct, existing, pecuniary interest of the contestants in this case will be directly affected by the establishment of the present will? Not a syllable in the record shows any. Here, as in the **McDonald** case, they have only a possible contingent interest and that is not enough under the decisions, without dissent. The other wills were filed. They were not offered for probate. Nothing is more axiomatic in the law of wills than that they have no virtue or worth for any purpose until admitted to probate in the manner required by law. Until then they are of no more value as muniments of title or evidence of property rights than that much blank paper. It is the establishing of them in legal manner alone that invests them with efficacy as a muniment of rights in property. The record in this case is barren of any evidence that the will sought to be set aside will constitute any obstacle to

the enjoyment of any property rights in the subject matter of this contest, for they do not appear to have any **direct, existing, pecuniary** interest which will be affected if they fail in their complaint.

It is believed there are other errors in this record in the admission of evidence and in the instructions that would require a reversal of the decree. But that now pressed is fundamental. It should not be ignored, if correct. If the law shall not operate uniformly upon fundamental concepts and in the application of positive requirements, it is an unstable and capricious standard of justice and right.

I think the decree in this case should be reversed without remandment, for the reason assigned.

242 I.A. 656

General No. 7917

Agenda No. 25

October Term, A. D. 1925

W. H. Rohrer, Complainant and George L. Kimber,
Receiver, etc., Appellants

vs.

Fred E. Deatherage, E. B. Coe, et al, Respondents,
E. B. Coe, Appellee

Appeal from the Circuit Court of Morgan County
SHURTLEFF, J.

Two questions are raised on this appeal. First, the priority of right of a mortgagee holding a prior recorded mortgage, which includes the rents, issues and profits after default foreclosure, and application for a receiver over the claims of a tenant under the mortgagor who has paid a year's rent in advance and who is in possession of the land; and second, the power of a state court to determine a deficiency after a Federal court has taken the administration of the mortgagor's estate, including the mortgaged lands, out of the hands of the state court, but specially reserved to the state court the settlement of the receiver's account, the mortgagee having consented to the sale of the lands in the bankruptcy court free from the mortgage lien, and where the lands do not sell for a sum sufficient to pay the mortgage debt.

On March 1, 1920, Appellee Deatherage ^{must} ~~mort~~-gaged the lands in question to Appellee Rohrer, to secure the payment of notes to the amount of twelve thousand dollars. The mortgage recited: "Together with the rents, issues and profits thereof." There was a prior mortgage on the lands, executed on the same day, to George L. Kimber, to secure the sum of twenty-one thousand dollars, which was a lien on said lands superior to the Rohrer

mortgage. The notes secured by the Rohrer mortgage, being post due, Appellant Rohrer filed his bill to foreclose on the 14th day of March, 1924, making Deatherage and his wife, mortgagors, and Appellee Coe, defendants to the bill. The bill averred that the mortgagors were insolvent, the lands inadequate security and prayed for the appointment of a receiver. Appellee Coe answered the bill and set out a lease made between the mortgagors and Appellee Coe, on the 25th day of February, 1924, by which the lands were leased to Appellee Coe for the term of one year from March 1, 1924, to March 1, 1925, for the consideration of nine hundred dollars rental, paid in advance by Appellee Coe to Deatherage, and that Appellee Coe was in possession of said lands under the lease, working and farming said lands. Appellee Coe further answered that at the time he entered into said lease he had no notice of any default on the part of the mortgagors.

On June 20, 1924, upon notice given, the court appointed Appellant George L. Kimber receiver, and an order was entered "That the Defendant Coe, lessee of the Defendant Deatherage, shall retain the possession of said real estate until March 1, 1925, as the tenant of the receiver aforesaid, all questions touching the rights of the Defendant Coe under his lease with the Defendant Deatherage, shall be determined upon the coming in of the report of the receiver." Under this receivership a considerable quantity of grain was harvested upon the farm and by agreement between Appellee Coe and the Receiver stored in buildings upon the farm, under lock and key, and afterwards, without the consent of the Receiver, broken into by Appellee Coe and sold to parties having notice of the receiver's interest in the grain.

On July 24, 1924, there was a decree of foreclosure entered in the cause, finding that the mortgagors were indebted to

Appellant Rohrer in the sum of \$14,311.92, and ordering certificates of indebtedness to be issued to Appellant Rohrer, and that the lands be sold at the expiration of the period of redemption, subject to the Kimber twenty-one thousand dollar mortgage indebtedness to satisfy and pay said indebtedness. After the entry of said decree, the mortgagor, Deatherage, filed his voluntary petition in bankruptcy in the United States District Court, and a trustee was appointed to administer the estate, and upon December 4, 1924, the trustee filed his petition in the Federal court in the bankruptcy proceedings, asking for the sale of the real estate described in the bill of complaint in this proceeding, and asked that said real estate be sold by the bankruptcy court, free and clear of the mortgages; and it further appears that a hearing was had in said bankruptcy court on January 7, 1925, of which due notice was given to all creditors and to all defendants in the petition, and that Fred E. Deatherage, the mortgagor and bankrupt, Appellant Rohrer, Appellee Coe and others, were personally in court at the time of such hearing, and that no answer or objections were filed. A decree for the sale of said lands was entered, which recited that Appellant Rohrer had consented to the sale of said premises, free and clear of the lien of his mortgage and of said certificate of indebtedness. It was found by decree that it was for the best interest of the estate and the creditors that the premises be sold free and clear of all mortgage liens and the liens should be transferred to the proceeds of sale to the same extent and effect as they now and theretofore have been upon and against the said premises. It was further found that Appellee Coe was in possession as tenant, with term to expire March 1, 1925. The amount of the Kimber mortgage was adjudicated and settled at twenty-one thousand dollars with accrued interest. Appellant Rohrer's indebtedness was adjudicated at the amount

of the certificate of indebtedness, as determined in the foreclosure proceedings in the Morgan County Circuit ^{Court} ~~Court~~, and those proceedings recognized and followed. The amount of the bankruptcy court costs were adjudicated at \$1,422 of which twelve hundred dollars was charged against the lands in question. The total amount found due upon the mortgages and the twelve hundred dollars costs amounted to about \$39,224.30, and the lands were ordered sold to satisfy said indebtedness. The lands were sold at public sale and bid off by Appellant Rohrer for \$31,950 and the sale approved by the court upon report made by the Trustee on March 9, 1925, and conveyances were ordered to be executed to Appellant Rohrer.

In the decree of the bankruptcy court as to the matters adjusted, there is a clause as follows: "Except the contested claim for rents, issues and profits for 1924 which the Circuit Court of Morgan County, Illinois, is given hereby the right and permission to hear and determine." On the sale of said lands and the distribution of the proceeds, there is a deficiency of \$7,274.90 in an amount with which to pay the indebtedness of Appellant Rohrer.

To the May Term, 1925, of the Morgan County Circuit Court, in the foreclosure suit, Appellant Rohrer presented his motion reciting the substantial facts as herein stated, together with the Receiver's report, and asked the court to enter an order determining the rights of Appellee Coe under his lease with Deatherage, and for relief, etc. Appellee Coe at the same time presented his motion, asking for an order discharging the receiver and to dismiss the bill of complaint as to him. Proofs were heard, embodying the facts as recited in this opinion, and the records of the bankruptcy court, and the court below entered a decree finding that "the complainant, Rohrer, is not entitled to

any relief as against the defendant Coe, and that the said defendant Coe is entitled to have and retain to his own use all the rents, issues and profits of said premises from March 1, 1924, to March 1, 1925," and the proceeding as to Appellee Coe was dismissed. The receiver, Kimber, had filed a report showing the expenditure of certain costs and charges in the said receivership paid by him, and he has joined with Appellant Rohrer in this appeal and both assign error.

It is first contended on the part of appellee, in support of this decree, that appellee, having no notice or knowledge of Deatherage's default on said mortgage, by his payment of rent in advance, was **bona fide** purchaser of said leasehold and should be protected in its enjoyment. We cannot agree with this contention. The mortgage of appellant, having been recorded, was notice in fact of appellant's claim against said lands. **Elgin City Banking Co v. Carter**, 83 Ill. App. 411; **Elgin City Banking Co V Carter**, 185 Ill. 536; **Heckman v. Detlaff**, 283 Ill. 511.)

At common law the mortgagee was held to be the owner of the fee and could bring ejectment against the mortgagor, or his assignee, before or after condition broken. In **Barrett et al. v. Hinckley**, 124 Ill. 42, the court stated the doctrine:

"In **Carroll v. Ballance**, 26 Ill. 9, which was ejectment by the mortgagee against the assignee of the mortgagor, to recover the mortgaged premises, this court thus states the English rule on the subject: 'In England, and in many of the American States, it is understood that the ordinary mortgage deed conveys the fee in the land to the mortgagee, and under it he may oust the mortgagor immediately on the execution and delivery of the mortgage, without waiting for the period fixed for the performance of the condition,—citing Coot on Mortgages, 339; **Blaney v. Bearce**, 2 Greenlf, 132; **Brown v. Cramer**, 1 N. H. 169; **Hobart v. Sanborn**,

13 id. 226; **Northampton Paper Mills v. Ames**, 8 Mete. 1. And this right is fully recognized by courts of equity, although liable to be defeated at any moment, in those courts, by the payment of the debt.' Again, in **Nelson v. Pinegar**, 30 Ill. 481, which was a bill by a mortgagee to restrain waste, it is said: 'The complainant, as mortgagee of the land, was the owner in fee, as against the mortgagor and all claiming under him. He had the **jus in re** as well **ad rem**, and being so, is entitled to all the rights and remedies which the law gives to such an owner.' So, in **Oldham v. Pfleger**, 84 Ill. 102, which was ejectment by the heirs of the mortgagor against the grantee of the mortgagor, this court, in holding the action could not be maintained, said: 'Under the rulings of this court, the mortgagee is held, as in England, in law, the owner of the fee, having the **jus in re** as well as the **jus ad rem**.' In **Finlon v. Clark**, 118 Ill. 32, the same doctrine is announced, and the cases above cited are referred to with approval. **Taylor v. Adams**, 115 Ill. 574."

In **Lane v. King**, 8 Wend. 478 (11 N. Y. Com. Law. Rep.), the law is aptly stated: "In **Keech v. Hall**, Doug. 21, already referred to, the mortgagee brought an action of ejectment against a tenant, who claimed under a lease from the mortgagor, given after the mortgage, without the privity of the mortgagee. Lord Mansfield in delivering the opinion of the court said: 'On full consideration we are all clearly of the opinion that there is no inference of fraud or concert against the mortgagee to prevent him from considering the lessee of the mortgagor as a wrong doer.' The question turns upon the agreement between the mortgagor and mortgagee; when the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises at will, in the strictest sense, and therefore no notice is ever given to quit, and he is not even entitled

to reap the crop as other tenants at will are, because all are liable to the debt, on payment of which the mortgagee's title ceases. The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage; the tenant stands exactly in the situation of the mortgagor."

The statutory provision permitting a redemption from the mortgage sale, and the tendency of court decision in this and other states, has been to limit somewhat the rule of the common law, and it was held in **Kransz v. Uedelhofen**, 193 Ill. 485. "The doctrine is still maintained, that the mortgagee can bring ejectment against the mortgagor, but the tendency of the later decisions has been to hold that this right has been so far limited, as to confine the bringing of the action to cases where the condition of the mortgage has been broken, or where there has been failure to make payment of principal or interest according to the terms of the mortgage. The more reasonable rule is that the title exists for the benefit of the holder of the mortgage indebtedness, and as a means of coercing payment of that indebtedness. (**Barrett v. Hinckley**, *supra*.) The general doctrine on the subject is thus stated in **Esker v. Heffernan**, 159 Ill. 38: 'Our present statutory form of mortgage, containing, as it does, the word 'warrant,' and carrying with it all covenants of title, does not materially differ from the common law form of mortgage, and it follows, therefore, that the mortgagee may maintain an action of ejectment, after condition broken, against the mortgagor or any other person in possession of the mortgaged premises.' The rule that the mortgagee can only bring ejectment against the mortgagor after condition broken seems to be sustained by the following authorities in this state: **Vansant v. Allmon**, 23 Ill. 26; **Kilgour v. Gockley**, 83 id. 109; **Oldham v. Pfleger**, 94 id. 102; **Mester v. Hauser**, 94 id. 433; **Anderson v. Strauss**, 98 id. 485; **Taylor v. Adams**, 115 id. 570; **Davis v. Dale**, 150 id. 239; **Esker v. Heffernan**, *supra*."

The same rule is laid down in **Esker v. Heffernan**, 159 Ill. 38; **Lightcap v. Bradley**, 186 Ill. 520, and **Ladd v. Ladd**, 252 Ill. 48. In the last case cited it is held that the burden of proof is upon the mortgagor to show that there is no breach of condition. (Citing *Kales on Future Interests*, sec. 15.) It was held in our earlier cases that, upon mortgage foreclosure, even where the mortgage does not, by express words, give a lien upon the income derived from the property, the court may appoint a receiver to take charge of it and collect the rents, issues and profits arising therefrom, but such action will not be taken, however, unless it be made to appear the mortgaged premises are an insufficient security for the debt and the person liable personally for the debt is insolvent. **Haas et al. v. Chicago Building Soc.** 89 Ill. 502.

In **Anderson et al. v. Strauss**, 98 Ill. 490, the court held that, "the clause in the deed of trust permitting the grantor to enjoy the rents, profits and issues until default, was merely declaratory. Such was the legal effect of the deed, independent of the clause. As soon as default occurred, the permission ended." In this case counsel had cited **Lane v. King**, *supra*, which the court apparently followed. The mortgage, as provided by statute, and the trust deed are treated as identical, qualified conveyances. (**Lightcap v. Bradley**, *supra*, page 518; **Ryan v. Illinois Trust & Savings Bank**, 100 Ill. App. 252.)

There is authority and it has been held that even where a trust deed or mortgage authorizes the appointment of a receiver to collect the rents, it would not be enforced in a court of chancery, except where the equities of the case require that it be done, but it is held further that such an agreement in the mortgage is entitled to weight in determining whether the power of the court to make the appointment should be exercised or not. **Bagley v. Illinois Trust and Savings Bank**, 199 Ill. 76;

Bothman v. Lindstrom, 221 Ill. App.

270. Certainly in a case where the agreement is contained in the mortgage and it is further shown that the land is inadequate security and the mortgagor insolvent, it would be inequitable to deny the mortgagee the security covered by his contract. "Rents and profits are just as much property as the estate out of which they arise and are equally the subject of mortgage or sale." **First National Bank v. Ill. Steel Co.** 72 Ill. App. 640; **Ryan v. Illinois Trust and Savings Bank**, *supra*, page 253; **First National Bank, v. Ill. Steel Co.** 174 Ill. 148. In the last case cited, where, upon a sale, it was found there was a deficiency to pay the debt, the court held: "Tested even by this requirement, if the mortgage did not give a lien by express words, or authorize the appointment of a receiver, the facts in the case at bar show that the court committed no error. The deficiency decree itself evidences the fact that the Ashley Wire Company's property was insufficient security for the mortgage debt and the facts establish the allegation in the petition that the Ashley Wire Company the mortgagor, was insolvent. Undoubtedly, a court of equity exercises a certain discretion, even where express words are used for the purpose of giving a lien on the income of the mortgaged property. The court must determine whether the language used in the mortgage is sufficient to give a lien on the income. In the one case the authority arises from the contract, the express words giving a lien on the rents and profits; in the other the court exercises its equitable powers under the facts and circumstances presented at the time the application to appoint a receiver is made." And the court held further that the enforcement of the provision of the mortgage hypothecating the rents, resting entirely in the sound discretion of the chancellor, was not tenable. It has

further been held that the court may appoint a receiver either before or after the decree and sale. (**First National Bank v. Ill. Steel Co.**, *supra*; **Bolton v. Starr**, 223 Ill. App. 43.) In the last case cited the court held: "While the trust deed in question did not contain, in the granting clause, the words 'pledge' or 'rents,' it gave the grantee 'all, right to retain possession of said premises after any default,' and the right to appoint a receiver in language that cannot be construed otherwise than a pledge of the rents to satisfy the debt. In the case of **Bagley v. Illinois Trust & Savings Bank**, language less explicit was held to pledge the rents for the payment of the debt as fully as the property itself, and the court added that 'to make the pledge effectual the appointment of a receiver to collect them was stipulated for. Such a provision in the mortgage created a valid lien on the rents, which equity will enforce without regard to the question of insolvency of the mortgagors.' (Citing cases.) And it was said in the **First Nat. Bank of Joliet** case, *supra*; 'By the appointment of the receiver' the appellants obtained an equitable lien on the rents and profits of the lands during the statutory period allowed for redemption, if necessary for the full payment of any deficiency in the security."

If upon default the mortgagee is entitled, at law, by ejectment, to recover the possession of the lands, or, inequity, by a receiver to sequester the rents, issues and profits of the lands, as against the mortgagor and those claiming under him or having notice of the mortgagee's title, it would seem to follow that the mortgagor could not transfer, assign or convey any greater interest in the lands than he owned, possessed or held. It was held directly in **Lane v. King**, *supra*, that the mortgagor could not lease or convey any such interest. This court in **Niccolls v. Peninsular Stove Co.**, 48 Ill. App. 321, having the

identical question before it, held: "The right of the appellant to the rents in question, secured to him by the mortgage and the action of the court in appointing the receiver could not be contracted away by the mortgagor. We think the court erred in awarding any portion of the rents to the appellee." And substantially the same question is passed upon, with a similar finding, in **Ryan v. Illinois Trust and Savings Bank**, *supra*, and in **Howard v. Burns**, 201 Ill. App. 582. Our conclusion is that the lease given by Deatherage, to Appellee Coe was subject to the right of the mortgagee, the appellant.

Appellee further insists that the transfer of the cause to the bankruptcy court, upon the voluntary petition of the mortgagor and the sale of the lands, free from all liens, by the consent of appellant, exhausted appellant's rights under the mortgage to the lands, and all of his securities by virtue of the mortgage. The bankruptcy court found, by its decree, that it was for the best interest of all parties concerned to sell the lands, free and clear of the mortgage liens. It is held (in note) in 35 American Law Reports, page 258: "The rule is uniform and long established, that a United States District Court, sitting as a court of bankruptcy, has, under the general equity powers conferred by the Bankruptcy Act, authority to order a sale by the receiver or trustee of the bankruptcy property, free from all liens and encumbrances." Citing numerous cases, including *Re Leslie-Judge Co.* (1921) 256 U. S. 704, 65 Law Ed. 1180. In such cases the lien or encumbrance is transferred to the proceeds of sale. Appellant was not responsible for the cause being transferred to the bankruptcy court, and, by the terms of the mortgage, appellant was not restricted to any particular court in which he should pursue his remedy. Appellant filed his bill and procured a decree in the state court. Appellee's grantor is solely responsible for the

transfer of the cause. Nothing is suggested or argued that the transfer of the cause was in any manner detrimental to appellee's interest. The decree of the bankruptcy court, finding that it was for the best interest of all parties to sell the lands freed from the mortgage liens, must be taken as true and correct. Appellee was a party to the proceeding, present in court and made no objections. The decree stands, not appealed from, and is a verity. The mortgagor by the decree lost his right of redemption; appellant waived a portion of a year of his lien upon rents, issues and profits and appellee's pretended lease was not interfered with. The lands at the sale are presumed to have brought their full market value, and if appellant purchased the lands he must be presumed to have brought their full market value, and if appellant purchased the lands he must be presumed to have been the highest bidder and to have aided appellee more than those who offered a lower bid, if there were other bids. Nothing is suggested amounting to an estoppel. The sale of the lands did not extinguish appellant's lien upon the rents, issues and profits. In **Bolton v. Starr**, *supra*, (page 44) it is held: "It is also urged that the decree of foreclosure and sale extinguished the trust deed and rendered it **functus officio**. But as said in the **Haas** case, *supra*, referring to appropriating the rents after the foreclosure sale: 'The security, plainly, is not exhausted by the sale, for there is a fund included in it which is secondarily liable.' It was said in the **Owsley** case: 'The property described in the mortgage was sold at the sale, but the rents and profits that accrued during the redemption period were not sold.' In the latter case the court also said that as under the provisions of the trust deed appellees were entitled to have their deficiency decree or judgment paid out of the rent, and as no order in such a case could properly be entered for the application of the rents in satisfaction of the debt until after the sale, it can be only

after the deficiency was established that appellees would be entitled to an order so applying the rents. While the order for such application could not be made until after the deficiency decree, that fact would not preclude the exercise of the court's jurisdiction to that end by appointing the receiver before the deficiency is ascertained where the facts justified it." (**Haas v. Chicago Building Society, supra; Owsley v. Neeves**, 179 Ill. App. 61.

Further, the contention over the rents, issues and profits, by the decree of the bankruptcy court, was specially reserved and remitted to the Circuit Court of Morgan County, with jurisdiction to settle and adjust. It was a proper order. It was held in **Lightcap v. Bradley, supra**, (page 526): "The sale of premises under a decree of foreclosure, where the decree does not expressly save any right to resort to the land again, is an absolute discharge of the premises from the lien." And it was said in **Owsley v. Neeves, supra**; and in **Bolton v. Starr, supra**: "The property described in the mortgage was sold at the sale, but the rents and profits that accrued during the redemption period were not sold."

We cannot agree with appellee's contention that the transfer of the cause to the bankruptcy court had any effect upon or released any of appellant's rights. It appears from the records offered in evidence in the court below, that upon a legal sale of the lands to enforce appellant's mortgage rights, the lands have been sold, and that there is a deficiency of about \$7,274.90 in the proceeds of sale with which to pay appellant's mortgage.

An order was entered in the court below appointing a receiver, and it was further ordered that Appellee Coe, lessee of the Defendant Deatherage, shall retain the possession of said real estate until March 1, 1925, as the tenant of the receiver. This order, in

effect, permitted Appellee Coe, then in possession of said lands, to continue in possession and to work and cultivate said lands as the tenant of the receiver. If no special contract was made between the receiver and appellee as to the amount of rent, Appellee Coe should pay the fair, cash, market rental value of the land to the receiver, and the receiver, after deducting his reasonable costs and charges to be allowed by the court, should, by the order of the court, turn over any balance in his hands to apply upon the deficiency that may be found upon appellant's mortgage indebtedness.

In the opinion of this court the Circuit Court of Morgan County erred in not determining the deficiency remaining unpaid of appellant Rohrer's mortgage debt, in not settling and determining the amount of rent due and owing by Appellee Coe to the receiver and settling and disposing of the receiver's account; and in dismissing the bill as to Appellee Coe.

For the reasons stated, the decree of the Circuit Court of Morgan County is reversed and the cause remanded.

Reversed and Remanded.

On petition for a rehearing counsel for appellee seriously criticises the statements of fact as presented by the majority opinion, as to the transactions between the receiver and Appellee Coe. It is said that such statement is not supported by the record. The recital of facts as to the receivership is based upon the report of the receiver in court, properly verified, of which there was no denial or contradiction in the record by appellee or any of the defendants, the appellee merely contending by motion that the complainant Rohrer "is not entitled to any relief as against the defendant E.B.Coe, who, prior to the commencement of this suit, in good faith leased the premises described in the bill of complaint from the defendant Deatheridge for the year from March 1, 1924, to March 1, 1925, for a cash rental of nine hundred dollars, which rental was thereupon paid in advance to the said Deatheridge; that the defendant Coe thereupon became and was entitled to the possession of said premises for the said year expiring March 1, 1925, and was entitled to the issues and profits thereof, and the crops grown thereon for the said year 1924."

Appellee Coe was a party defendant to the suit and was subject to the order of court appointing a receiver, whether he attorned to the receiver or not. No proofs were taken in the court below other than the verified report of the receiver, as to the truth of the facts set out in the report. There was no occasion for the taking of proofs upon the report as the receiver was an officer of the court and there was no objection made to any fact stated in the report. Appellee, in the court below, stood squarely upon the ground that the lease made to him on February 25, 1924, for the use of the lands from March 1, 1924, to March 1, 1925, rent paid in advance, gave him a superior right over the mortgage. In addition to what is set out in the majority opinion, we cite Cox v. Snyder, 241 Ill. App. 475. At the time of making this lease no rents or profits had accrued upon the land. What appellee really attempted to purchase was an incorporeal hereditament, a part of the land itself, as held in Cox v. Snyder, supra.

We have examined fully Taylor v. Osman, 239 Ill. App. 569, cited by counsel for appellee. We find nothing in that case stating any different rule than the one we have held to in the case at bar. We have not held in this case that the receiver is entitled to any rents or profits accruing prior to the appointment of the receiver.

For the reasons stated, the petition for a rehearing is denied.

NIEHAUS, P. J.

I cannot concur in the majority opinion in the final conclusions reached, there is no doubt about the legal right of a mortgagee in a proceeding instituted by him to foreclose a mortgage which contains the provision concerning rents issues and profits, here involved, and through the appointment of a receiver, to enforce the collection of such rents issues and profits, to be applied on the mortgage indebtedness, but the question which has arisen in this controversy, is whether there were any rents issues and profits to collect after the appointment of the receiver; and the question whether the receiver could exact rent for use and occupation of the premises from the appellee Coe, who was a tenant at the time of the receivers appointment by virtue of a lease from the mortgagor Deatherage, and had paid the rent due under his lease for the use and occupation of the premises. The facts pertaining to the leasing of the mortgaged premises are not in dispute. The mortgagor Deatherage leased the premises to Coe on the 25th day of February 1924; this was before any condition of the mortgage had been broken, and before any foreclosure proceeding had been instituted. Under the terms of the leasing, the rental for the use and occupation of the premises by the tenant for the year commencing March 1, 1924, and ending March 1, 1925, was fixed at \$900.00, payable in cash, and in advance; and was paid by Coe in accordance with the terms of the leasing. After he had leased the premises, Coe in good faith took possession of the premises, and farmed the same; and he had planted his crops, and was raising corn and oats at the time foreclosure proceedings were instituted. On June 20th thereafter the court entered the order appointing the appellant George L. Kimber, receiver. In this order of appointment the following provision and reservations are made: "That the defendant Coe, lessee of the defendant Deatherage, shall retain possession of said real estate until

March 1, 1925, as tenant of the receiver, aforesaid, and all questions touching the rights of the defendant Coe under his lease with the defendant Deatherage, shall be determined upon coming in of the report of the receiver."

As appears from the order, the court directed that the appellee Coe should retain possession of the premises as tenant of the receiver; but Coe refused to recognize the receiver as his landlord, and never attorned to him; always claiming his right to the use and occupancy of the premises to be under his lease from Deatherage.

And the order clearly reserves, "all questions touching the rights of the defendant Coe under his lease with the defendant Deatherage, shall be determined upon the coming in of the report of the receiver." Coe prayed an appeal from this order, but did not perfect the appeal. What transpired afterwards between the receiver and Coe in reference to this tenancy is shown by the receiver's report, namely, that "on August 26th, 1924, the said Coe and the undersigned placed 725 bushels of oats, which were grown on said real estate, in the oats bin on said described real estate, and the undersigned on August 27th, locked the door thereof, and on Sept. 3rd, 1924, posted on said bin a notice in the following form: 'Notice to all whom it may concern: The oats contained in this bin are in my possession as receiver of the rents, issues and profits of this land, under the appointment by the circuit court of Morgan county.'

* * * It also appears from the receiver's report, "that on the 29th day of August, 1924, at the request of said Coe, this receiver opened said oats bin and granary to allow said Coe to put therein 150 bushels of seed oats; that on or about December 25, 1924, this receiver, at the request of said Coe, opened said oats bin and allowed said Coe to put therein a wheat drill; and that during either January or February 1925, the oats in said bin were removed therefrom without the consent of the undersigned; that the undersigned has demanded payment of said Coe of the landlord's share of said crop; but said Coe has refused, though often

requested, to pay the same; that negotiations were had with said Coe to the effect that the proceeds of all crops grown on said premises during the season should be put into the hands of this receiver, and by him brought into court to abide the decision of the court as to the rights of the respective parties; and that it was the understanding of the undersigned that this agreement was satisfactory to all persons concerned, and that the same would be faithfully carried out. That this receiver accordingly endeavored from time to time to accomplish said result; that the said Coe has hindered said plan from being carried out; that 4516 bushels of corn on said premises were sold by said Coe to E. T. Harrison of Waverly, Illinois, 2500 bushels thereof being sold at 85 cents per bushel and 2016 bushels thereof being sold at 88 cents per bushel; that said Coe refused to recognize the undersigned as entitled to receive the landlord's share of the corn from said premises. * * * That he, said receiver, has made repeated demands upon said Coe for the rent of said premises, but payment thereof has been refused.' The first question which has arisen in this controversy, in connection with the right of appellee Coe to the crop raised by him, is whether the lease entered into by Coe and the Deatherage, was valid; and another question to be determined is, whether the mortgagor Deatherage could legally collect the rent under the lease which was due and payable in advance. The rights of a mortgagor to lease and collect rents due for mortgaged premises was passed upon by the Supreme Court in **Gross v. Will County National Bank** 177 Ill. 33, where the following comment is made: "The rule at common law, laid down by this court, is, that a mortgagor is not required to account to the mortgagee for rents and profits while he remains in possession. (**Moore v. Titman** 44 Ill. 367; **Mississippi Valley and Western Railway Co. v. United States Express Co.** 81 Id. 534.) A mortgagee cannot interfere with the right of a mortgagor until he enters upon the property, or gives notice to the tenants in possession thereof;

been paid four months prior to the receiver's appointment. The mortgagor did not have any interest in the crop that was raised on the premises, hence nothing was due in the nature of "issues or profits." It is clear from the facts recited in the receiver's report, that Coe never attorned to the receiver; the order of court directing that Coe should hold his possession under the receiver never became effective; Coe never recognized the receiver, as his landlord, but always claimed his right to the use and occupation of the premises to be under the Deatherage lease; and that he was entitled to the crops which he raised as tenant under the lease. It is not necessary to discuss or determine the question whether the receiver under his appointment had the right to dispossess Coe upon his refusal to attorn to him, or to become his tenant, inasmuch as no attempt was made to enforce such a right. The receiver's efforts in the matter were directed entirely to the procuring of Coe's crops as they matured, under the assumption that he was entitled to a portion of these crops as receiver under his appointment.

In the situation of the parties with reference to the subject matter of the controversy, the question arises, whether or not the receiver could legally exact rent which had accrued prior to his appointment; and which had been paid prior thereto; and whether the receiver could compel the tenant, Coe, to pay other rent than that stipulated in his lease, or additional rent to that paid by him under the terms of his lease. So far as we have been able to ascertain, this exact question has not been passed upon by the courts of review in this state. But the question arose and was determined in **Lawrence v. Conlon** 56 NY Suppl. 345; in which case a receiver was appointed in a mortgage foreclosure proceeding, and sought to compel a tenant to again pay rent, which he had already paid to the landlord, a mortgagor, before the commencement of foreclosure proceedings. In the opinion in the case cited, the Court refers to the case of **Wyckoff v. Scofield**, 98 NY 475, in which the court of Last Resort had held, that while a mortgagee may in a proper case, "upon suit for foreclosures, have a re

ceiver of the rents and profits appointed who will be entitled to collect and receive such rents as have theretofore accrued, but have not yet come to the hands of the owner of the equity of redemption, and apply them to the payment of the mortgage debt, still the court has not power to order rents, already collected, and in the possession of the owner, to be paid over and thus applied. The lien of the mortgagee, or the receiver upon the rents dates only from the appointment of the receiver; and the right of the receiver to collect rents extends only to such as are unpaid at the time of his appointment." Then the court makes the following comment: "In the present case, the arrangement between the owner of the equity of redemption, Zoeller and Marks, was entered into a considerable time before the appointment of the receiver, and before the foreclosure suit was commenced. The lease to May 1st was part of the purchase price on the sale of the property from Marks to Zoeller, and I find no authority for depriving Marks of his rights thereto. It is not claimed that there was any fraud or collusion between Marks and Zoeller, and there was no reason for not believing that it was a plain straight forward and bona fide contract. The receiver cannot turn Marks out for non payment of rent that had been paid, without fraud or collusion before the appointment of a receiver. See **Insurance Co. v. Stebbins** 8 Paige, 565; **Argall v. Pitts** 78 NY 239; **Rider v. Bagley** 84 NY 461; **Wyckoff v. Scofield** 98 NY 475."

The conclusion which I have reached therefore is, that the receiver in this case has no claim on any part of the crop raised by Coe, for rent due or accrued, and that the finding of the court sustaining Coe's right to the crop by virtue of the Deatherage lease, was proper and should be affirmed.

Affirmed.

W. E. Hilton, Plaintiff in Error,

v.

Henry A. Wright, Defendant in Error.

242 I.A. 656

Writ of Error to the Circuit Court of Morgan County
Shurtleff, J.

The only question involved in this suit is, whether an indorsement upon a note tolled the statute of limitations and represented a payment upon the note, which implied a recognition and promise to pay the entire debt.

Defendant in error did a brokerage business in live stock, shipping stock from the National stock yards at East St. Louis to various points, the plaintiff in error furnishing the funds with which the stock was purchased, and the shipments were made in plaintiff in error's name. Defendant in error had suffered some losses and upon November 26, 1913, executed and delivered his promissory note to plaintiff in error, payable upon demand, for the principal sum of \$1285, with interest at seven per cent per annum. The business was continued until March 10, 1914, when a settlement was had and the amount of \$25.99 due defendant in error was indorsed by mutual consent upon the note. At the time of this settlement there were some damage claims on shipments pending, which were talked about, and defendant in error stated to plaintiff in error at that time, that whatever plaintiff in error secured on said claims to credit upon the note. The claims were filed in plaintiff in error's name. On April 1, 1915, plaintiff in error collected the sum of twenty-five dollars upon a

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claim and indorsed it upon a note. Defendant in error never had any notice of this payment or of its endorsement. Suit was brought upon the note March 31, 1925. There is no controversy as to the facts. The court instructed a verdict and there was judgment for defendant in error.

Plaintiff in error assigns error upon the giving of the peremptory instruction and entering judgment for the defendant in error. Although the note was payable upon demand, the Statute of Limitations commenced to run at the date of the note. (*Knecht v. Boshald*, 138 Ill. App. 430; *Luther v. Crawford*, 116 Ill. App. 351.)

A new promise to pay the debt may be implied from the actual payment by the maker upon the note, but

"there must be an actual, affirmative intention to make a payment on the note," before the promise can be inferred. (**Lowery v. Gear**, 32 Ill. 386.)

In **Kallenbach, Jr. v. Dickinson**, 100 Ill. 434, the court, quoting from **Lowery v. Gear**, held: "There must be an actual, affirmative intention to make a payment on the note before we can infer the promise. It is a general rule, no doubt, that where a debtor makes a payment without designating to which of several claims it shall apply, the creditor may apply it to which he pleases; but this could not authorize Brown to so apply it as to bind Gear by an implied new promise, without the actual intention of Gear to make such a promise. This was a matter in which Gear must have had an affirmative intention, before he could be bound. His volition was indispensable in order to bind him. If he had no thought or intention one way or the other, even then he could not be held to have made a new promise, for to do that he must have had an affirmative intention."

And the court further said: "There must be such circumstances

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as reasonably authorize an inference of an intention to waive the bar of the statute. There must be affirmative action or conduct assigned to prospectively affect the rights of the parties to the prior contract."

In **Wellman v. Miner**, 179 Ill. page 334, the court, quoting **Connelly v. Pierson**, state. "'An endorsement of a partial payment on a note, made by the holder without the privity of the maker, is not, of itself and uncorroborated, sufficient evidence of payment to repel a defense created by the Statute of Limitations.'" (**Roseboom v. Billington**, 17 Johns. 182; **Lowery v. Gear**, 32 Ill. 383; **Kallenbach v. Dickinson**, 100 id. 427; **Drury v. Henderson**, 143 id. 315; 36 Ill. App. 521; **Treadway v. Treadway**, 5 id.

478; **Mills v. Davis**, 113 N. Y. 243)."

In **Ruhl v. Gambril**, 175 Ill. App. 644, the court held that the theory upon which part payment of a debt takes a case out of the statute, is that, "the party making the payment intended by it to acknowledge and admit the greater debt to be due. If, therefore, it was not in the mind of the debtor to do this, then the operation of the statute will not be affected by the payment."

In all of the cases cited the court holds that the burden of proof is upon the plaintiff to show the payment by the debtor, and that such payment was made under circumstances and conditions that warranted the inference that the debtor recognized and impliedly agreed to pay the larger debt. In the case at bar plaintiff in error testified: "We had shipped a few loads of cattle to other markets that had claims in or that he was interested in, where we might get a small amount from and I spoke to him about those. He said whatever I got I want you to credit them on the note." This conversation was on March 10, 1914.

Plaintiff in error further testified: "I got \$25.00 on

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these claims April 1, 1915. It was credited on this note by the direction that he gave me there on March 10, 1914. That \$25.00 was due to Mr. Wright on cattle that was handled for his account. It was obtained from some railroad—I think it was the B. & O. railroad. This stock was shipped in my name. The claim was for damages that occurred—something of the kind."

This claim was made in the name of plaintiff in error and allowed and paid to plaintiff in error. It is very indefinite who paid the claim or its nature. The legal title to the claim was in plaintiff in error, who had the right to collect and apply it upon the note without the direction of defendant in error. Any direction that defend-

ant in error gave as to the item was given more than ten years prior to the commencement of said suit and after the statute commenced to run. By the direction given by defendant in error on March 10, 1914, and by the payment and endorsement on the note, defendant in error parted with no money or other valuable thing from which an intention can be inferred to recognize the larger debt. Defendant in error made no payment upon the note April 1, 1915, had not appointed the plaintiff in error on March 10, 1914, his agent to collect any amount due from any person, but when the stock was shipped in plaintiff in error's name, defendant in error had fully clothed him with full power to collect for any damages in shipment, and (after the note was given) with full power to apply all such collections upon the note indebtedness. As to the direction of March 10, 1914, the most that can be said of it is, that defendant in error transferred his equitable interest in the damages claim to plaintiff in error who then had the legal title and plaintiff in error thereby became fully vested with all interest in the claim, which was then applied upon the note. Defendant in error had no further interest

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in the claim or its payment, from which any inference could be drawn or upon which any implied contracts could be based. By the direction of appellee on March 10th, 1914, and the payment indorsed on the note by appellant on April 1st, 1914, no circumstances or conditions are shown, that warrant the inference, that the debtor appellee, recognized and impliedly agreed to pay the larger debt, on any date, after March 10, 1914. In the opinion of this court the transaction in question did not constitute a payment by defendant in error on April 1, 1915, which would bar the running of the statute, and the judgment of the Circuit Court of Morgan County should be affirmed.

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Affirmed.

54636

242 I.A. 656

Gen. No. 7975

Agenda No. 11

April Term, A. D. 1926

Minnie Johnson, Appellee,
vs.

J. W. Blakesmith, Appellant

Appeal from City Court of Canton
SHURTLEFF, J.

Appellee brought suit against appellant for the care, board and nurturing of his minor child, Gladys, when she was about nine years of age. Appellant's wife was a sister of appellee. Appellee lived at Brereton and appellant at Canton, about four miles from Brereton. In June 1921, appellant's wife, with her youngest child Gladys, came to the home of appellee in Brereton and there died nine days later. Appellant did not visit his wife during her last sickness. After the mother's death the child remained and lived with her aunt, appellee, until the following April. She then went to live with a brother, who had married, but returned to appellee's home in March, 1925, and remained until in September, 1925.

There is no express promise proven on the part of appellant to pay for the child's care. Appellee testifies that on the day of the funeral, two days after her sister's death, appellant came to her home and asked her to keep Gladys two or three days until he could get settled; that appellant never came for the child and never made any inquiries about her. From the testimony it appears that appellant was a miner with an income of fourteen hundred dollars per year in 1921, which was reduced to about one thousand dollars per year at the time of the trial, but he never established a home of his own after his wife's death and from appellee's testimony never made any provision for the child, but utterly failed

and neglected to care for and support the child. Appellant testifies that when he talked with appellee, two days after his wife's death, he asked to take the child and place her in the care of his sister, but that appellee refused to let him take the child and told him she could take care of her sister's children. There is a sharp conflict as to just what took place at this time between appellee and appellant, but appellant testifies that the child could have had a home with his sister and with his son after his marriage, but appellee and appellant had no further communication after the one stated and appellee made no demand for compensation until a short time before this suit was brought. Appellant has never paid appellee anything for the care of the child. There was a verdict and judgment for appellee in the sum of \$145 and the record is brought to this court, by appellant, for review.

Appellant assigns error upon the giving of appellee's first instruction. This instruction submitted to the jury in substance the language of the statute in force June 24, 1925, and in force at the time of the making of the alleged contract, making it a misdemeanor for any reason, without reasonable cause, to neglect or refuse to provide for the support or maintenance of his wife or his minor children under eighteen years of age, they being in destitute or necessitous circumstances, and giving the penalty therefor. There was some testimony of appellee as to the circumstances of the wife and child coming to appellee's home the death of the wife and what took place on the day of the funeral, coupled with the fact that appellant never returned for the child or paid further attention to her, tending to show a statutory neglect of the child, upon which a liability could be founded. However, if there was any error in the giving of this instruction, appellant committed the same error in his first instruction, given by the

court, in informing the jury that in determining whether the plaintiff was entitled to recover upon an implied promise of the defendant to pay for the necessities alleged to have been furnished, etc., they should consider whether the defendant consented that the plaintiff have custody of said child and whether the defendant, at the time said alleged necessities were furnished, was wrongfully neglecting to provide for such child, etc., or, whether the plaintiff voluntarily took and kept the custody of said child without the knowledge or consent of the defendant, etc. If appellee's first instruction was erroneous, and we do not so hold, appellant has fallen into the same error and cannot complain.

Appellant assigns error upon the giving of certain instructions for appellee, one of which, the eighth, is most subject to criticism. It was given as follows: "The court instructs the jury that the statutory and legal duty of the father to support his minor child is sufficient consideration to support a promise to pay for the care and support of his minor child, and the court also instructs you that the said statutory and legal duty is sufficient cause to imply a contract to pay a third person for the services in rendering care, support and maintenance to the minor child of a father."

The third instruction informed the jury that, in case the plaintiff rendered services for the child and that the services so rendered were necessary for the child, and the jury further believe that the child was living separate from its father, with the defendant's permission, the jury would be justified in finding an implied promise to pay for the board and lodging on the defendant's part.

The fifth instruction informs the jury as to the legal,

moral and statutory duty of the father to support and provide for the maintenance of his child and instructed the jury that this legal and statutory duty amounts to an implied promise or agreement on the part of the father to pay for the necessary and reasonable support and maintenance of his minor child. The tenth instruction was along the same line, but incorporated the element of care, maintenance and support of the minor child, which was with the knowledge and consent of the defendant and in which the defendant voluntarily took the benefit of such labor and support. Then the jury were informed that the law will presume that the plaintiff is to be paid for her labor and services unless the contrary is shown by the evidence. None of these instructions are mandatory. Plaintiff's fourth instruction properly informed the jury as to the acts and circumstances from which a promise to pay could be implied. Appellee's eighth instruction is subject to criticism under the facts in this case. It did not incorporate all of the elements in the case and might have been prejudicial to appellant except for several mandatory instructions offered by appellant and given by the court that the jury should find for the defendant, unless among other things the jury should find, either that the defendant expressly promised to pay the plaintiff for such necessities or facts and circumstances from which such promise might reasonably be inferred. The jury were fully instructed that if they believed from the evidence that plaintiff voluntarily took and cared for the child, they should find for the defendant, and the jury were fully instructed as to the right of the parent to have the care and custody of the child and that if the jury believed from the evidence that the defendant was furnishing a proper home and support suited to his means and station in life for the child, and that the plaintiff or another person took, or caused to be taken, said child from the custody

of the defendant and without any express or implied promise from the defendant to pay for the maintenance of the child, they should find the issues for the defendant. The instructions are to be considered as a series, and if, when so considered, they fully and fairly instruct the jury they will be considered sufficient. (*Clofski v. Railroad Supply Co.* 235 Ill. 154.) Taking the instructions as a whole we cannot say they were prejudicial, or that the jury was not fully and correctly advised.

In a similar case, *McMillen v. Lee*, 78 Ill. 445, the court, having a similar instruction under consideration, said: "Objection is taken to the giving of this instruction for the plaintiff:

" 'The court instructs the jury that the law does not require that there should be an express promise by a father to pay for medical services rendered to his child, in order that he should be made liable therefor, but that, if such services were necessary for the child, or that are rendered under circumstances sufficient to raise an implied promise, then the law implies a promise on the part of the father, on account of his relationship, to pay for the same; and if, from the evidence in this case, the jury believe that the services rendered by plaintiff were necessary for the child doctored which was a child born of defendant's wife during the time they were legal husband and wife, and living, before and after its birth, with defendant, then the jury will find for the plaintiff, and assess his damages at the sum the plaintiff's services have been shown to be worth. "

"We recognize the law to be, as claimed by the appellant, that either an express promise, or circumstances from which a promise by the father can be inferred, are necessary, in all cases, to bind the parent for necessities furnished his infant child by a third person. *Hunt v. Thompson*, 3 Seam. 179; *Kelley v. Davis*, 49 N. H. 187.

The instruction was wrong, in its latter branch, in asserting a liability if the services were necessary, without reference to any promise, express or implied, to pay for them. But there was so little room for question, that, under the circumstances, there was an implied promise, and the jury having been distinctly instructed, on behalf of the defendant, that there must have been a promise, express or implied, we can not think the instruction did the defendant any harm, and are of opinion that the defect in the instruction was not, under the circumstances, so material as to require a reversal of the judgment, and it will be affirmed."

In **Johnson v. Smallwood**, 88 Ill. 74, the court, quoting from Parsons on Contracts, Vol. 1, page 301, says: "The authority of the infant to bind the father by contracts for necessities is inferred, both in England and in this country, from very slight evidence." The true rule is laid down in **Hunt v. Thompson**, 4 Ill. 179, and cited in **Mullally v. Lott**, 162 Ill. App. 534:

"That a parent is under an obligation to provide for the maintenance of his infant children is a principle of natural law; and it is upon this natural obligation alone that the duty of a parent to provide his infant children with the necessities of life rests; * * * This natural obligation, however, is not only a sufficient consideration for an express promise by a father to pay for necessities furnished his child, but when taken in connection with various circumstances has been held to be sufficient to raise an implied promise to that effect. But either an express promise, or circumstances from which a promise by the father can be inferred, are indispensably necessary to bind the parent for necessities furnished his infant child by a third person.'"

Appellant's substantial defense appears to be that appellee insisted upon caring for and maintaining her sister's child, and yet in April, 1922, the child, Gladys Blakesmith, of her own wish, went to the home of her sister and lived for three years, and the record shows no dissent or opposition on the part of appellee. At the end of three years the child returns to appellee, without request or solicitation on the part of appellee, so far as the testimony shows. This contradicts appellant's theory that appellee persisted in having sole care of the child.

Some question is raised that the judgment is excessive and that the proofs show that the reasonable value of the entire care and support of the minor by appellee was only five dollars. Inasmuch as the question and answer did not specify whether that value testified to pertained to week, month or the entire period there is no merit in the assignment. The jury heard the testimony and, we must assume, applied to it their knowledge and experience of a most common, every-day, affair. We have read all of the testimony and from a consideration of it we are satisfied that the verdict and judgment do substantial justice between the parties. In that state of the record the judgment of the lower court should not be disturbed for the criticisms raised on the instructions in this case. (**Ford v. Ford**, 257 Ill. 346; **Beard v. Maxwell**, 113 Ill. 440; **West Chicago St. Ry. Co. v. Maday**, 188 Ill. 310.)

The judgment of the City Court of Canton is affirmed.

Affirmed.

Faber-Musser Company, Appellant,

v.

William E. Dee Company, Appellee.

242 I.A. 656

Appeal from the Circuit Court of Sangamon County.

Shurtleff, J.

This case has been before the Supreme Court, 291 Ill. 241, and before this court at two previous hearings, reported in 227 Ill. App. 618, and 232 id. 643. For a more extended statement of the case reference is here had to the opinions filed pursuant to those hearings, respectively. On May 14, 1917, appellant and appellee entered into a contract in writing for the purchase and sale of fire brick and special shapes, upon the following terms:

Order

Your No.

Date May 14, 1917.

Our No. 10

Firm Wm. E. Dee Clay Mfg. Co., Location, Springfield, Ill.

Please ship ----- as follows to

Dealer Faber-Musser Co. Location, Peoria, Ill.

Charge to, Same Location, Same

Approximately 800 M. Fire Brick and Special Shapes
of the following grades:

Dee Crown -----26.00 per M. F. O. B. factory

Oak Hill -----23.00 per M. F. O. B. factory

Large wire cuts-----20.00 per M. F. O. B. factory

Fire clay -----5.35 per T. F. O. B. Peoria

subject to and accepted with terms on attached letter.

Important (This is absolutely essential)—send us immediate acknowledgment of this order, stating date shipment can be made. On Day of Shipment—Send us duplicate of Invoice and copy of all correspondence to party receiving shipment, relative to this order.

Faber-Musser Co., Peoria, Ill.

Per JH

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May 14, 1917.

Wm. E. Dee Clay Mfg. Co.,

Springfield, Ill.

Gentlemen:

Attention: Matthew Dee.

Confirming our verbal conversation we are pleased to accept your proposition as per the attached order, and

with the following stipulations. The price quoted as follows:

Dee Crown -----	26.00 per M. F. O. B. factory
Oak Hill -----	23.00 per M. F. O. B. factory
Large Wire Cuts -----	20.00 per M. F. O. B. factory
Fire Clay -----	5.35 per T. F. O. B. factory

All special shapes in standard brick to be paid for on a tonnage basis equivalent to the cost of the same grade of clay as used in the brick, plus the usual charge for the molds, with the understanding that the freight will not be in excess, on the basis of seven dollars thirty five cents (\$7.35) per thousand on the standard fire brick on this shipment.

It is also understood that you will commence shipping on this order within two weeks from date you receive specifications on all straight brick and shapes, and on all special shapes shipment to be made not later than ninety (90) days from date of specification on the entire order.

Specifications to follow within ten (10) days from the above date.

It is understood that your firm is in a position to make immediate shipment of all straight brick and standard shapes.

Very truly yours,
Faber-Musser Co.
Per

FMF J

Accepted.

(Signed) Wm. E. Dee Clay Mfg. Co.,
Per Matthew M. Dee.

It will be noted that the letter states that specifications are to follow within ten days from the date of contract. It has been determined in the former hearings that a legal and binding

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contract was entered into, as above set forth, and that appellee failed to carry out the terms of the contract and the case is now before this court on the question of damages. On the last hearing before this court it was held that the rule applicable to this case, as repeatedly announced by the courts of review in this State is, that the measure of damages is the difference between the contract price of the articles contracted for and the market price at the time of the breach, citing **Driggers v. Bell** 94, Ill. 223; **Sleuter v. Wallbaum**, 45 id. 43; **Phelps v. McCee**, 18 id. 155; **Tribune Company v. Bradshaw**, 20 Ill. App. 17.

It was further held that appellee (now appellant) had

the right in this situation to go into the open market at the time fixed for delivery and supply itself with the brick which appellant had failed to deliver under the contract at the market price then prevailing; but it was held that the evidence did not show that the prices paid for brick by the then appellee were the market prices at the time fixed for delivery. The judgment was reversed and the cause remanded for another trial. Upon redocketing the cause in the Circuit Court of Sangamon County, a jury was waived and the cause submitted to the court upon the same testimony submitted on the former trial and upon a stipulation to introduce any other evidence desired to clear up any question as to the definiteness of the damages; and it was further stipulated that Mr. Fred Faber might be called and testify as to one matter, namely, the submission of a list of shapes of brick to the defendant at its office in Chicago and the testimony of Mr. Faber concerning his receiving the list furnished to the defendant (appellee) from the Keystone Company, all of which was to be subject to objection on the coming in of the testimony. There was a trial before the court and a finding and judgment for appellant, the court assessing nominal damages in the sum of one dollar.

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Appellant contends that substantial damages should have been awarded. It appears that on May 22, 1917, appellant visited the offices of appellee and presented specifications of brick required on the contract, as follows:

258 M 9 in. Sts. 1st Quality Dee Crown	
1 M No. 1 Splits	
1 M No. 2 Splits	
2300 No. 1 Wedge	
3 M Soaps	
17 M No. 1 Arch	For my
2 M No. 2 Arch	Chicago file
1750 No. 1 Key	For Dee & Co.
13 M No. 2 Key	
21 M No. 3 Key	
1500 No. 4 Key	
355 M 9 in. Sts.	2nd qual Oak Hill
1 M No. 1 Splits	
1 M No. 2 Splits	
2 M Soaps	
7500 No. 1 Arch	
10 M No. 2 Arch	
6800 No. 1 Key	

8100	No. 2 Key
1500	No. 3 Key
7500	No. 4 Key
500	No. 1 Large Key
500	No. 2 Large Key

This was from an original list furnished appellant by the Keystone Steel and Wire Company, appellant's customer, and appellee's agent copied the same. Appellant at the same time left with appellee a blue print and specifications of the building being constructed by the Keystone Steel and Wire Company, which, it is claimed, contained the description and list of all "special shapes" required by that company in their construction, and appellant's testimony tended to show that its specifications to appellee included the "special shapes" upon the blue print. The blue print was not in evidence. In the midst of the trial appellant for the first time called upon appellee to produce it. Appellee did not deny receiving a blue print but did not have it in the State of Illinois. Appellee insisted it had never been called upon in the numerous former trials, for the instrument.

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It was not included in the stipulation.

It was not shown but that there were other copies or originals of the blue print in existence. Nevertheless, over the objection of appellee, the witness was permitted to testify to the contents of the print from a letter appellant had written the Keystone Steel and Wire Company, under date of June 15, 1917, tendering a sale of certain brick by appellant to said company after the witness had testified he had no independent recollection of the items contained upon the blue print. He did testify that the items in the letter were correct, as contained upon the blue print, but not from his independent recollection. The letter was written more than three weeks after the blue print was submitted and the items shown were as follows:

Thirty-three hundred pieces of B-16; 95 pieces of B-17; 2700 pieces of B-18; 95 B-19s; 230 B-20s; 1,000 pieces B-21 230 pieces of B-22; 825 B-skew back; 3,100 pieces of B-62; 1,250 B-63s; 150 pieces of S. P. No. 1; 230 pieces S. P. No. 2; 10,650 pieces of S. P. No. 3; 288 pieces of S. P. No. 4; 2,080 pieces S. P. No. 5; 208 pieces S. P. No. 6; 16 pieces of S. P. No. 9; 16 pieces of S. P. No. 10; 102 pieces of S. P. No. 11; 64 S. P. 12s; 150 S. P. 13s; 650 pieces S. P. 14s; 208 pieces S. P. 7; 144 pieces S. P. 8; 8 pieces S. P. 15s; 80

pieces of X; 450 pieces of double X (XX), and 500 pieces of G.

This was error. (*Young v. The People*, 221 Ill. 51; *Russell Burdsall & Wood Inc. v. Excelsior Stove & Mfg. Co.*, 120 Ill. App. 23.) No testimony or explanation of any kind was offered as to the nature, kind, quality or price of 'Splits,' 'Wedge,' 'Arch' or 'Keys' and there is no testimony explanatory of the terms and numbers claimed to be upon the blue print. Appellant testified that the total tonnage of the items claimed to be shown upon the blue print as "Special Shapes" was 557 and one-half tons and

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there was testimony that a thousand brick weighed seven thousand pounds. There was no testimony of any kind as to the market value of fire clay or "the usual charge of the molds," as set forth in the contract. In the testimony it appeared there were different grades of clay from which the special shapes could be made, and that in the specifications appellant requested that the "special shapes" be made out of the first class or highest grade of clay. By the contract appellee does not appear to have made any price or offered to have furnished "special shapes" made from the first class clay. As to the testimony in the court below as to the market value of Dee Crown brick and Oak Hill brick at Peoria on June 5, 1917, the time when appellee breached the contract, the Circuit Court of Sangamon County recited the testimony and made a finding as follows:

"Mr. Faber testified that for several years he has been engaged in the handling of material covered by the contract and has bought and sold brick of the kind and character described in the contract; that he was familiar with the market value of said material in June, 1917, by having purchased quantities of this material from various sources; that he received quotations and made inquiries during this time from various manufacturers in that district and so became familiar with the values of this material during the month of June; that from this experience he is able to state the market value during the month of June, 1917.

"He was later asked if he had an opinion as to what the market value of Dee Crown brick per M was on June 5, 1917, and answered that he had. He was then asked, 'What is that opinion?' and answered, '\$49.35 per M.' The same questions were asked as to Oak Hill brick. Witness then was asked if he knew the market value of the brick on June 5, 1917, and answered that he did, and gave

values as before. Witness was asked if he bought qualities of brick similar to Dee Crown and Oak Hill in the month of June, 1917, and answered that he did. He was not positive as to the date, but it was prior to June 15th. The purchase price was \$49.35 per M for Dee Crown quality, which last answer was excluded on motion of defendant.

"On cross-examination plaintiff testified that the price of fire brick so far as quality is concerned, is governed to a certain extent by the grade, quantity and quality of fire clay. The witness was asked if the market value of \$49.35 of Dee Crown on June 5, 1917, was derived from the price he actually paid for the brick to supply the alleged default of the Dee Company in furnishing Dee Crown brick and answered, 'Substantially.' He was also asked, 'And that is true as to the Oak Hill?' and answered, 'Yes, sir; substantially.' He was also asked as to shapes, 'That testimony is based on what you actually paid for shapes, is it not?' Answer, 'Yes, sir.'

"Witness answered he bought the major part of the brick to supply the default in the Dee Crown brick from the Chicago Retort & Fire Brick Company, and in answer to the further question 'your testimony as to the market value of the Dee Crown brick is based on the price you paid to the Chicago Retort & Fire Brick Company for the brick that you bought from them to apply on this contract?' Answer, 'Yes, sir.' Later; after further questioning, he was asked, 'And the market price that you have testified to is derived from what you paid substantially the Chicago Retort & Fire Brick Company for what you bought of them?' Answer, 'Not in total.' Question: 'From what other purchases?' Answer: 'From my observation and quotations and written prices gotten from other manufacturers in this particular district at that particular time***

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and it was through knowledge that I gained by working with other manufacturers at the particular time and preceding and since that gave me the knowledge that I have in saying to you that I thought—I feel that the market price was \$49.35 the day I placed that order per M brick, f. o. b. Peoria for specific prices and other prices for other quantities.

"The evidence shows the date this order of \$49.35 was placed was on or about June 15th, and the evidence further is the prices were continually rising.

"Witness was questioned and answered that he could

not give the prices of brick of any other concern except the price he paid to the Chicago Retort & Fire Clay Company for the brick, and he was asked: 'So that the only concern, the market value of whose brick you can now give on the 5th day of June, is the Chicago Retort & Fire Brick Company?' Answer: 'Specifically, yes; I had that information at the time I placed the order.' Question: 'That market value is derived from what you paid for the brick on that date?' Answer: 'Yes, sir; substantially.'

"Witness answered there were probably a hundred manufacturers of fire brick in his district and he could not give the price of brick of any manufacturer on June 5th, except the Chicago Retort & Fire Brick Company, as above, about June 15th.

"Mr. Thorpe, a former employe of the Chicago Retort & Fire Brick Company, testified as to market price in the month of June, 1917; that he knew what 'our prices (Chicago Retort & Fire Brick Company) were.' Afterwards he answered he knew the market price of Dee Crown quality brick and that it was \$49.35, and Oak Hill quality \$42.30. On cross-examination witness said these prices were derived from what his company, the Chicago Retort & Fire Brick Company, sold brick at.

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"Henry F. Krieg called by defendant testified that he is a ceramic engineer; that he was employed by the Midland Terra Cotta Company in 1917, and is now employed by the William E. Dee Company; that he was educated and experienced in testing brick; that in 1917, he tested Chicago Retort & Fire Brick Company and also William E. Dee Company brick; that they were made of different clays and the former were superior brick to the William E. Dee company brick; and that he had made investigation as to market prices of the two and that he was familiar with the prices and that the Chicago Retort & Fire Brick Company brought higher prices on the general market than the William E. Dee Company brick; The Sterling brick of the Chicago Retort & Fire Brick Company was of a higher quality than the Dee Company Dee Crown, and the Ajax brick was a higher quality than the Oak Hill, and the two grades of the Chicago Retort & Fire Brick Company were of a higher market value than the two grades of the William E. Dee company brick, approximately \$5.00 per M.

"The Sterling brick and the Ajax brick were the brick which the plaintiff purchased to fill the places of the William E. Dee 'Dee Crown' brick and the 'Oak Hill' brick.

"Witness testified there were other makes of brick of the same or similar quality as the Dee Crown and Oak

Hill brick, then on the market. On cross-examination witness testified 'my tests were made in the spring of 1917, March or April, on twenty-five or thirty makes of brick.'"

The court further found: "The evidence does not show any price asked by dealers or manufacturers in Peoria where the contract was made, on June 5th nor at any time, nor the price paid by purchasers in Peoria, nor any price except the price asked by and paid to the Chicago Company for a higher grade of brick at a later date and on varying market."

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This testimony fails to show the market value of Dee Crown brick and Oak Hill brick at Peoria on the 5th day of June, 1917, and does not tend to show but that those grades of brick did have a market value at the time and place in question. We have read the records and the proofs support the court's finding. The court had the witnesses before him and heard the testimony and the judgment of the lower court should not be disturbed on its finding of fact, unless against the manifest weight of the testimony. Market value is a conclusion for the court or jury and although testified to by an expert or other witness, the court must find in accordance with the evidentiary facts. (*Cissna v. Walters*, 100 Ill. 623; *Keefe v. Armour & Co.*, 258 id. 28; *Chicago, etc. v. Smith*, 69 Ill. App. 69.)

The burden of proof is upon the plaintiff to prove what the market price was of the same or similar material at the time of the breach, and if he fails to do so he is restricted to normal damages. (*Harman v. Washington Fuel Co.*, 228 Ill. 301; *Peoria Grape Sugar Co. v. Turney*, 175 id. 631.)

Finding no error in the record, the judgment of the Circuit Court of Sangamon County is affirmed.

Affirmed.

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242 I.A. 657

General No. 7984

Agenda No. 20

April Term, A. D. 1926

Peter Matvey et al, Appellees,

vs.

The City of Mt. Olive, Appellant

Appeal from the Circuit Court of Macoupin County
SHURTLEFF, J.

This is an appeal from a judgment of the Circuit Court of Macoupin County for \$2,700 in favor of Peter Matvey et al., appellees, and against the City of Mount Olive, appellant.

The declaration avers that appellees are the owners of a certain farm, consisting of 180 acres of land, lying immediately west of the City of Mount Olive; that the farm was being used and enjoyed for farming and pasturage purposes and was in the actual occupancy of Peter Matvey, one of the appellees; that a considerable portion of said farm was in pasture and that through this portion of the farm flowed a small natural fresh-water stream, fed by fresh-water springs which provided pure water in abundant quantity during all seasons for stock and cattle, that in the year 1922, appellant, the City of Mt. Olive constructed a sewer system, consisting of sewer main and pipes, thereby conducting the sewage from and out of said city to a certain basin and septic tank located immediately east of appellees' land; that the sewage from said city was discharged and deposited by and through a large outlet pipe upon the land and into the fresh-water stream running through the lands of appellees, thereby rendering the water foul, polluted and impure and wholly unfit for uses and purposes to which appellees put said stream; that sewage was discharged upon,

over and across appellees' land and rendered the same unhealthful and caused noxious stenches and odors, thereby wholly depriving the appellees of the use and enjoyment of the said stream and land; that the construction of the said sewer system by appellant is of a substantial and permanent character and nature and the said city has continuously operated and discharged sewage upon, over and across the lands of appellees since the installation of said sewer system, and has thereby greatly depreciated the market value of the said lands and farm of the appellees. The theory of the declaration is that the construction of the sewer system by appellant was of a substantial character and nature and was a lawful permanent structure, and that the damage to the lands of appellees naturally and necessarily followed from the operation and discharge of sewage and that the rule for damages was the depreciation in the fair cash market value of the farm on account of the construction and operation of the sewer system, and that damages past, present and future were united in one cause of action. Appellant filed a plea of the general issue.

The evidence discloses that appellee Peter Matvey is in actual possession and occupancy of a certain farm of 180 acres, lying about a quarter of a mile west of the City of Mount Olive, a city of about 4,000 inhabitants. Appellee purchased this farm in 1919 for \$65 an acre, and had continuously used and enjoyed said farm for the cultivation of crops and also as a dairy and stock farm. The evidence shows that there are sixty-five acres of pasture land in said farm and that through said pasture there flowed prior to the acts complained of, a small fresh-water stream or branch, fed by a number of springs which gave to the appellee an abundant supply of fresh pure water during all seasons of the year. The water in this branch was suitable for drinking purposes for man or beast and in former years a wind-

mill had been installed near the said stream and springs which pumped the water up to the house and improvements, located on the said farm.

The farm was, according to the testimony of the witnesses, suitable and adapted to stock and cattle raising and for use as a dairy farm, and the appellee Matvey was using the farm for that purpose and at the time of the trial possessed fourteen milk cows and other stock, including cattle and horses to the extent of twenty-seven head.

In the year 1922 the City of Mount Olive dug and constructed a sewer system for the said city, and by means of pipes, drains and laterals collected the sewage from the west half of the said city by means of an outlet sewer pipe, discharged the said sewage upon, over and across the lands of appellee and into said natural water course and fresh-water stream running through the farm. The pipe through which the sewage flowed from the city was thirty inches in diameter. The discharge of sewage from this pipe was directly into an open concrete basin five feet wide east and west by thirty feet long north and south, lying at right angles to the line of flow of the thirty-inch pipe from the city. This basin was twenty inches deep and entirely uncovered. Immediately west of this basin and opposite the north half of the same was a concrete tank buried in the ground, of the dimensions of twenty feet north and south and seventy feet east and west; a twelve-inch pipe extended from this basin into said tank, this pipe being at the northerly end of said basin, the southerly end of said open basin extending beyond and south of the septic tank. The west end of the septic tank was eighteen feet from the east line of appellee's farm, and the sewage from said septic tank was discharged through a fifteen-inch pipe. The basin and septic tank

above described were located upon a small tract of ground outside the limits of appellant city and had been purchased by said city for that purpose. The construction of the septic tank and the open basin was of concrete and wholly permanent and substantial.

The evidence shows that at time of heavy rains and flood the velocity of the sewage discharged into the shallow, open basin was such that it overflowed the westerly edge of the basin and into a ditch going south of and around the septic tank and thence upon the lands of appellee, and during such periods only a portion of the sewage entered the septic tank. The septic tank itself was a mere settling tank, and there was no treatment tank or disposal tank in connection with the sewer system installed by the appellant, and in times of storm, when the sewage and rain water were discharged into the septic tank with great velocity, then the sewage and solids in the septic tank were agitated by the rushing water and washed out of the discharge pipe upon, over and across the lands of appellee.

The evidence of appellee showed that the discharge of sewage into the fresh-water stream rendered its waters foul, obnoxious and impure and unfit for cattle to drink and that cattle would not drink the said water. The evidence further showed that in extremely warm weather the odors from said sewage were offensive and obnoxious for a distance of three or four blocks, depending upon the direction of the wind. The discharge from the septic tank into the stream of appellee was discolored, having characteristic septic effluent present, and was decidedly unfit for cattle consumption. Evidence shows that Matvey, appellee, was obliged to rent twenty acres from a neighbor in order to obtain water supply for his stock and cows.

Appellant urges two grounds for the reversal of this judgment:

First, that if the testimony of appellee's witnesses be given full credit it reveals a legally abatable nuisance, subject to the effect of sub head 3, section 466 of chapter 38 of the Revised Statutes of this State, and that in such cases damages may only be allowed to the date of suit commenced. Citing **City of Kewanee v. Otley**, 204 Ill. 402; **Schlitz Brewing Co. v. Compton**, 142 id. 511; **Langfeldt v. McGrath**, 33 Ill. App. 158; **Uline v. New York C. & H. R. R. Co.**, 101 N. Y. 98 (4 N. E. 536 and L. R. A. 1916 E. 1013.) However, upon the trial of the cause, without objection, each side offered testimony tending to show the market value of the lands as they existed, subject to annoyance and what the market value of said lands would be freed from the injury or nuisance, and both appellant and appellee offered instructions which were given advising the jury that the difference in such market values was the measure of damages in this case. It is a well settled rule of law that a party cannot try a case on one theory in the trial court and another theory in the court of review. **Lewy v. Standard Elevator Co.** 296 Ill. 304; **Butler v. Miller**, 208 id. 231; **Winnard v. Clinton**, 233 id. 320; **Illinois Central Co. v. Heisner**, 192 id. 573.)

Appellant is bound by its instructions as to the issues and law of the case. (**Buck v. Rosenthal**, 273 Ill. 194; **Lewy v. Standard Elevator Co.**, *supra.*) Inasmuch as both parties to this suit have tried the cause upon the theory that the plant in question was of a substantial and permanent character, and erected in pursuance of law, all damages for past, present or future injury to the property may be recovered in one action, and the same becomes a bar to all future actions upon the same cause. (**Catello v. C., B. & Q. R. R. Co.**, 298 Ill. 252; **Strange v. C. C. C. & St. L. Ry. Co.**, 245 id. 246.) There is no merit in

appellant's
contention.

The testimony of a large number of witnesses was submitted to the jury tending to establish the amount of the damages, and this court is not able to say that the verdict and judgment is against the manifest weight of the evidence. (**City of Winchester v. Ring**, 312 Ill. 548.) In this state of the record the judgment of the Circuit Court of Macoupin County is affirmed.

Affirmed.

Gen. No. 7992

Agenda No. 26

April Term, A. D. 1926

Laura Stubbs, Appellee,

vs.

242 I.A. 657

School Directors of District No. 51 in the County of
Adams and State of Illinois, Appellant,

Appeal from the Circuit Court of Adams County
SHURTLEFF.

Appellee commenced her suit in the Circuit Court of Adams County on May 28, 1925, by the filing of a praecipe and filed her declaration, consisting of two special counts and the common counts, to the June Term, A. D. 1925, of said court. In the special counts appellee alleged her qualifications and that the defendant, on to wit, the 1st day of September, 1924, employed appellee to teach in said school for the period from September, 1924, to May, 1925, eight months, at a salary of \$100 per month, and a total consideration of \$800, which appellant then and there promised and agreed to pay to appellee in installments of \$100 at the end of each and every month, and that appellee, in consideration of such employment and salary to be paid to her, entered into the service of the appellant as such teacher and continued therein until December 16, 1924, when the appellant, without any reasonable cause, wrongfully discharged appellee from said service and refused to permit appellee to complete her contract for service. Appellee further avers that at the time of her discharge and from thence until the expiration of the period of her employment, she was ready, able and willing to perform the duties of such service for appellant and in every respect to comply with

the terms of said contract with appellant, and that by reason of the premises appellant became liable to pay appellee the full amount of the salary so promised to be paid for the full period of eight months, and that there was then due and owing from appellant to appellee, under said contract, the sum of \$550, and that the defendant refused to pay the same.

Appellee further averred that since the time of contracting, under the name of Laura Hopson, she had been married and that her name was then Laura Stubbs. The second special count was similar and alleged an indebtedness under the contract. There was an affidavit of claim filed with the declaration, basing the claim upon: "\$50 salary earned as teacher in said district and \$550 balance on her contract as teacher after the time discharged," etc. Appellant filed the general issue and a number of special pleas in and by which appellant undertook to justify the discharge of appellee. Appellant filed an affidavit of merits in which it alleged that it had a good and meritorious defense to the whole of appellee's claim, except as to the sum of \$50 which was the balance due appellee from appellant at the time she was discharged by appellant and her contract terminated. The affidavit of merits further stated the facts as to a tender of the fifty dollars and stated the nature of the defense set out in the special pleas. There was a trial by jury. At the close of plaintiff's case and again at the close of all the evidence, appellant moved the court to instruct the jury to find the issues for the plaintiff and assess her damages at the sum of fifty dollars, after making various motions to strike out evidence. Instructions in form were presented. The court denied both motions. There was a verdict in behalf of appellee in the sum of \$550. Appellant presented a motion for a new trial and later in arrest

of judgment, presenting the objections which are made assignments of error in this case, both of which were overruled and a judgment was entered upon the verdict. Appellant has brought the record to this court, by appeal, for review.

Numerous assignments of error are made and we shall discuss the principal ones. It was error to enter judgment against appellant for costs and order execution, but this would not authorize a reversal of the judgment. A variance between the declaration and the proofs is pointed out in this court, which can be corrected upon another trial.

Appellant assigns error on the ground that under the declaration the pleas and the affidavits of claim and of merits appellee could not recover a greater sum than fifty dollars in this suit. This assignment of error is based upon the ground that appellee's claim, except as to fifty dollars, is for compensation for constructive service and that such compensation cannot be recovered in this case; that the only recovery that can be had under the circumstances is a claim for damages for the breach of the contract. In connection with this assignment of error others should be mentioned which do constitute error and they should be considered in connection with the one pointed out. On the trial appellant sought to show, on cross examination of appellee, that after entering into said contract and before commencing to teach under the same, she was married, and soon thereafter became in the family way and was delivered of a child. This was objected to by appellee on the ground that it was not one of the issues in the case and was not raised as a defense in the affidavit of merits. The inquiry was pertinent as tending to show whether appellee was at all times after December 16, 1924, ready, able and willing to carry out the terms of the contract during the

school year. It would also have been pertinent on the inquiry as to what appellee earned or could have earned during the year, after her discharge.

Appellant assigns error upon the giving of appellee's tenth and eleventh instructions. Instruction number ten informed the jury that there is nothing set up in the affidavit of merits of the defendant that would constitute any defense under the general issue in the case, and that defendant admits in each of the other pleas the employment of the plaintiff and that she was discharged and that the burden of proof was upon the defendant, under the pleadings, to justify the discharging of plaintiff. Instruction number eleven informed the jury as to the affidavit of claim and the affidavit of merits by appellant to its pleas, and that each party is limited by such affidavit and that only such claim as set up by the plaintiff in her affidavit of claim and only such defense as was set up by the defendant (appellant) in its affidavit, should be considered in the case by the jury. Neither of these instructions should have been given to the jury. They contained no principles of law applicable to the facts in the case of aid to the jury, but were rather confusing and prejudicial. Number ten in the opinion of this court as to the question of appellee's right in this case to recover for constructive services. After various holdings in the appellate courts of this State, the Supreme Court, in **Doherty v. Schipper & Block**, 250 Ill. 133, had the question before it and made a review of all the cases in this and other states and held: "We have examined the numerous cases bearing upon the subject which have been cited in the briefs, and are of the opinion that upon principle the only action which logically can be maintained, upon the facts of this case, against the appellee, is an

action for the breach of the contract of employment growing out of the wrongful discharge of the appellant, and that all damages resulting from such breach must be recovered in one action, and that after one recovery has been had that recovery is a bar to all future actions based upon the contract of employment or growing out of the relation of employer and employee by reason of the wrongful discharge of appellant

“We think the doctrine of constructive service, as applied to a case like this and where used as a basis of recovery, is illogical and unsound. This court has universally held that the proper measure of damages in a case like this is the contract price, less what the employee earned or could have earned. That being so, if the discharged employee can find employment it is his duty to accept it. How can it then be said that while he is performing service for another person he is constructively engaged in the employ of the employer by whom he was discharged? The result of this doctrine would be that the employee was actually performing service for one person while he was constructively performing service for another. The only true basis upon which an action like this can rest is for damages for breach of contract, and as the breach of contract occurs at the time of the discharge the cause of action is then complete, and such cause of action cannot be split up but all the damages must be recovered in one judgment and in the first action, and this being true, no subsequent action can be based upon the cause of action which has been merged in the first judgment.”

Appellee in her special counts and in her affidavit of claim, outside of the fifty dollars, has claimed the balance on her contract as teacher, not as damages for the breach of the contract but the terms of the contract. It was heretofore error not

to instruct the jury
as requested by appellant.

The court ruled that appellant's affidavit of merits was not broad enough to cover a defense under appellant's plea of the general issue. There was an issue raised by the proofs as to appellee's contract of employment, as to which we express no opinion. The affidavit of merits states that said defendant has a good and meritorious defense to the whole of plaintiff's claim, except as to the sum of fifty dollars. That this was true is shown by appellee's declaration and affidavit of claim. Appellee could not legally have recovered over the sum of fifty dollars upon her declaration and affidavit of claim. Even if the informality of appellee's claim should be waived and it be conceded that her claim was for damages for breach of the contract, still appellant's affidavit of merits was sufficient to entitle it to deny damages under the general issue.

It was held in **McPherson v. The Board of Education**, 235 Ill. App. 426: "One of the material allegations of appellee's declaration was as to damages. It is true, as contended by appellee, that appellant, as far as his defense was concerned, was limited to the defense set out in his affidavit attached to his pleas. **Reddig v. Looney**, 208 Ill. App. 413; **Goddard Tool Co. v. Crown Electric Mfg. Co.**, 219 Ill. App. 34; **McClintock v. Lake Forest University**, 222 Ill. App. 472. In his affidavit of defense appellant did not dispute the specific amount of damages as alleged in the declaration and the affidavit attached thereto. This did not relieve appellee of the burden of proving his damages as alleged, and, when he attempted to prove them, appellant had the right to cross-examine the witness and insist that the evidence was not sufficient to prove the damages alleged. Even in ease of a judgment by **nil dicat** every material allegation is admitted, and upon the question of damages, the defendant is

entitled
to cross-examine witnesses. **Marrone v. Ehrat**, 175 Ill.
App. 649; **Brown v. Gerson**, 182 Ill. App. 177; **Plaff**
v. Pacific Exp. Co.; 251 Ill. 246."

The court was in error in ruling on evidence and
instructing the jury that there was nothing in the af-
fidavit of merits of the defendant that would consti-
tute any defense under the general issue.

Error is assigned upon giving instructions num-
bers 9, 17, 23 and 24 for appellee. The subjects set
out in instructions numbers 9 and 23 should be con-
fined to appellee's performance of her duties. In-
structions numbers 23 and 24 are subject to the criti-
cism that they advise the jury that the employment of
appellee and the terms of the contract are not in issue
in the case. Some other assignments of error are made
as to rulings on evidence, but such as they are will
doubtless be corrected on another trial. The witness
Smith should ⁷¹² have been permitted to detail statements
made to him by appellee.

The judgment of the Circuit Court of Adams
County is reversed and the cause remanded for furth-
er proceedings.

Reversed and Remanded.

Edgar H. Buckley and Clara M. Buckley, Appellants,

v.

242 I.A. 657

Thomas M. Kilbride, Ridgely Farmers State Bank, and

O. E. Lemon, Sheriff, Appellees.

Appeal from Circuit Court of Sangamon County.

Shurtleff.

This suit involves a land purchase in North Dakota to close which, Appellant Buckley and one Thomas M. Kilbride, or one of them, borrowed \$9,000 from the appellee, The Ridgely Farmers State Bank of Springfield for the benefit of Appellant Buckley, and appellants filed a bill to enjoin the enforcement of the judgment entered by said bank. The appellants, husband and wife, we shall designate as Buckley and appellants; the Ridgely Farmers State Bank as the bank and Thomas M. Kilbride, who has been dismissed out of the case, as Kilbride.

Appellants' bill of complaint charges that in the fall of 1919 Kilbride informed him that one Erickson had a contract for 480 acres of land in North Dakota which they could secure at \$75 per acre, and that the land would be salable in a short time for \$90 per acre, and that if appellant would raise \$12,000 appellant and Kilbride could place a mortgage on the land for \$15,000 and together raise the balance, \$9,000, of the purchase price, place the title in appellants' name and that Kilbride would look after the handling and sale of the land, and that they would divide the profit. The appellant entered into the deal and paid over

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to Kilbride the sum of \$12,000 to apply upon the land, and later, in October, 1920, the balance, \$9,000, was secured from appellee bank by Kilbride giving his note to the bank for the sum of \$9,000 which was secured by the note of appellants for a like amount, secured by a second mortgage on the North Dakota lands, made payable to said Kilbride and by him indorsed over to the bank to be held as collateral security. The note for \$9,000 to the bank not being paid on June 4, 1923, the bank handed the mortgage note back to Kilbride who caused judgment thereon to be entered in his favor and Kilbride immediately assigned the judgment to the bank and execution was issued thereon.

The bill further charges that said note was secured from appellants by Kilbride through misrepresentation, concealment and fraud; that Buckley (appellant) had

been a pupil in school under said Kilbride and had full confidence in him; that said Kilbride secured said lands from Erickson at a price of \$47.50 per acre or a total consideration of \$22,800, and not for \$36,000 as represented by said Kilbride, and that said Kilbride had acted as agent and attorney for appellant in making said contract and in signing appellant's name to the contract and notes, and that there was no consideration for the note given by appellant to Kilbride and by him turned over to the bank.

The bill further charges that appellant placed entire confidence in Kilbride and relied in and trusted to his statements and representations and never had any knowledge as to the true facts in the case until about two weeks before the filing of the bill in this case on August 25, 1923. The bank and Kilbride answered the bill. The answer of Kilbride denies all of the charges of misrepresentation, concealment and fraud set out in the bill. Kilbride's answer alleges that Buckley had made considerable money in coal during the war and inquired of him for a

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good investment and that Kilbride mentioned this land and that lands in that vicinity were then selling from \$75 to \$100 per acre, and Kilbride avers that appellant purchased the lands at \$75 per acre; that he, Kilbride, had an option on the lands from Erickson at \$65 per acre and could have all that he could make on the lands above that price; that Kilbride paid Erickson \$8,400 out of the moneys paid him by appellant for Erickson's interest in the land; that to raise the moneys due by Erickson on his contract, Appellant Buckley gave back a mortgage to the owners for \$15,000 and requiring \$9,000 in addition appellant attempted to borrow the sum from his, appellant's bank, but could not secure it there; that appellant then appealed to Kilbride to assist him in securing the moneys at Appellee Bank, which he did; that Appellee Bank, upon request, refused the loan to appellant because he was not a customer of the bank, but later consented to accept Kilbride's note with appellant's note and second mortgage as collateral security.

The cause was referred to the master to take the proofs and report the proofs to the court without recommendation. Upon the coming in of this report, appellant dismissed the bill as to Kilbride. A large amount of testimony was taken upon consideration of which the chancellor dismissed the bill for want of equity, and the record is brought to this court for review.

The proofs very strongly preponderate in establishing

that Kilbride purchased the lands in 1920 or had an option to purchase for \$65 per acre and settled with Erickson for that amount. Kilbride admits that he had, out of appellant's moneys, \$4,800 as his profits or commissions, less \$1,200 which he had loaned appellant and "forgiven" him. The preponderance of the evidence is also very strongly to the effect that the loan of \$,9000

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from Appellee Bank was for the benefit and account of appellant. Appellant paid the interest on the loan until default. Once, appellant being in arrears, Kilbride paid the interest, and six months later appellant returned the amount to Kilbride. Appellant promised the bank to pay the debt before judgment, and repeatedly after judgment requested extensions and continually renewed his promises to pay. A very large number of witnesses living in the vicinity of the lands testified to the value of similar lands in that vicinity in 1920 and 1921, and stated that they had sold from \$65 to \$125 per acre. It is not claimed by any of the parties to this suit that even if there was any misrepresentations, concealment or fraud on the part of Kilbride, that the bank had any knowledge of or was a party to it in any way. It is contended that the bank, being assignee of the judgment, takes it subject to all equities, defenses and agreements, subsisting between the original parties, whether it had notice of them or not, acquiring, in this respect, no greater rights than its assignor had. This is without doubt the law. **Thorpe v. Helmer**, 275 Ill. 86; **Yarnell v. Brown**, 170 id. 367; **Dobbins v. Gieger**, 108 id. 188; and **Rea v. Forrest**, 88 id. 283. Whether this rule applies in all cases in a court of equity where the court can look through to the substance of what was done, rather than to the form, as at law, we are not called upon, in this case, to decide. It is also the law that when fraud is alleged it will not be presumed but must be proven as a fact by such clear and convincing evidence as leaves the mind well satisfied that such allegations are true. **Council v. Bernard**, 319 Ill. 392; citing, **Wolf v. Lawrence**, 276 id. 11, and **McKenna v. Mickelberry**, 242 id. 117.

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From a careful reading of all the testimony in this case we are not satisfied that any fraud was attempted or perpetrated upon appellant. The terms of the contract between appellant and Kilbride are testified to only by the parties themselves and they contradict each other, but all of the circumstances in the case corroborate Kilbride.

The decree of the Circuit Court of Sangamon County is affirmed.

Affirmed.

545

242 I.A. 657

Gen. No. 7998

Agenda No. 35

April Term, A. D. 1926

The David Jones Co., Appellant.

vs.

F. F. Bates, Appellee

Appeal from the Circuit Court of Maconpin County
SHURTLEFF, J.

Appellant brought its suit against appellee upon eight promissory notes, each for the sum of forty dollars, and one note for the sum of two hundred fifty dollars, based upon counts upon the notes and the common count. Appellee pleaded the general issue and two special pleas, one of which set out that the notes were given and delivered to appellant as part consideration for a certain C No. 4 Allinson Continuous Purifier, with a 500 gallon auxiliary tank for the sum of \$762, and that appellant guaranteed and warranted that the same would deliver satisfactory gas for recleaning and that the consideration upon which said notes were given had wholly failed. The second special plea set out the same matters, and that said machinery did not work or was not in condition to deliver satisfactory gas for recleaning purposes, and that appellee had suffered damages and loss of his property and the use thereof to the amount of \$500. The last plea averred that appellee had paid the sum of fifty dollars upon the machines.

On August 7, 1923, appellee entered into the following contract for the purchase of the machines:

The David Jones Co.
702 N. Third St. St. Louis.

Duplicate No..... Date 8-7-23
Sold to F. F. Bates.
Street Town Carlinville, State Ill.
Ship at once viaSalesman A. P. Arend.
Terms.....

This order is taken subject to the approval of our credit department and notification from our main office. It is subject to delays in delivery occasioned by contingencies beyond our control. No conditions other than those written or printed hereon will be recognized. The buyer accepts all the conditions herein and waives the right of cancellation.

Quantity Description Price.....
1 only cNo. 4 Allinson Continuous Purifier with 500 auxiliary tank 762.50. Terms 50.00 cash with order \$62.50 with B-L. Balance of \$650.00 in notes. Note No. 11 renewable every four months by paying interest and part of principle. Machine guaranteed to clean satisfactory gas for recleaning.

Buyer's signature F. F. Bates

Appellant installed the machines and there was evidence tending to show that there were mars and dents in the tanks upon arrival, and after the machinery was installed there were leaks developed, one of which appellant undertook to repair, and appellee's testimony tended to show that the gas which came through the purifier at times was dark and discolored and could not be used for cleaning purposes, and that he could not use the machinery. There was no claim upon appellee's part that the contract was rescinded or that he had paid over the sum of fifty dollars upon the contract. Appellee's testimony substantially

shows that the machines as delivered and set up were of the value of one hundred dollars. There was a verdict and judgment for appellee and appellant has appealed

The proofs do not establish appellee's first special plea that the consideration for said notes had wholly failed. The case was tried upon the theory that appellee was entitled to recoup damages if he could prove by the greater weight of the evidence that there was a breach of the particular warranty referred to and that damages resulted to appellee in consequence thereof. The measure of damages in such a case would be the difference between the value of the plant in the condition in which it was installed and the value it would have had if it had complied with the warranty. **Gifford-Wood Co. v. Western Fuel Co.** 209 Ill. App. 365; **Dravo Doyle Co. v. Sulzberger & Sons Co.**, 197 id. 547; **Mayer v. The Automobile Exchange**, 125 id. 648; **Sandow Motor Truck Co. v. Brown**, 216 id. 105; **C. W. Dooley & Co. v. Hasenwinkle Grain Co.**, 120 id. 45. Appellant's suit was based upon notes aggregating \$570 and interest, upon which appellee claimed to have been paid the sum of fifty dollars only and it is conceded that appellee has received and has in his possession the machines of the value of one hundred dollars. It would seem that there should have been a recovery of some amount, under the state of the pleadings, in appellant's behalf. The ninth instruction, given in behalf of appellee, was as follows:

"The Court instructs the jury that in this suit the defendant has the lawful right to make his defense of a breach of warranty and if the jury believe from the preponderance of the evidence that the gasoline clarifier and its equipment as installed in the building of the defendant was warranted to deliver satisfactory gas for recleaning, and if you further

believe from a preponderance of the evidence that it did not deliver satisfactory gas for recleaning and that such failure to deliver such gas was not by reason of the defendant Bates failing to properly operate such machine, if you believe any such failure is shown by the evidence, then and in that event the defendant has established his defense in this cause."

While this is not a peremptory instruction in form, the jury may well have inferred that the defendant had established his defense under the first special plea. The instruction, under the issues, was misleading and confusing and should not have been given in this case.

For the reasons given the judgment of the Circuit Court of Macoupin County is reversed and the cause remanded for further proceedings.

Reversed and Remanded.

5466

242 I.A. 657

Gen. No. 8007

Agenda No. 38

April Term, A. D. 1926

John Cleland, by John F. Cleland, his Next Friend,
Appellee,

vs.

Robert B. Eagle, Appellant

Appeal from the Circuit Court of Vermilion County
SHURTLEFF, J.

Appellee brought suit in trespass in the Vermilion County Circuit Court against appellant for injury and damage to appellee, a boy eighteen years of age, who was riding as a guest of Charles Harris in his Haynes car at the intersection of Williams and Sherman streets in the City of Danville. Harris was driving his car east on Williams street at a rate of speed of ten to fifteen miles an hour and as he approached Sherman street he passed a Dodge car about fifty feet before he reached the intersection. Appellee testified that he looked to the south and to the north and saw no cars approaching and Harris proceeded across the intersection until the car had passed the center of Sherman street when appellee first saw appellant's car, which was "right upon them." Appellant was driving a Studebaker car north on Sherman street at a rate of speed variously estimated by appellant's witnesses of from thirty to forty-five miles an hour and struck the Haynes car so that it turned over twice and appellee was injured.

The declaration contained three counts charging general negligence, unreasonable and improper speed, without regard to the traffic and the use of the way, and the third count charges that appellant drove his car at a speed in excess of fifteen

miles an hour at the place of the accident in a closely built up residential portion of the city of Danville. Appellant pleaded the general issue. There was a verdict and judgment for appellee in the sum of six hundred dollars and appellant appeals.

From the testimony of appellant's witnesses as to the speed of appellant's car, the jury were warranted in finding appellant guilty of negligence in driving at a rate of speed estimated at from thirty to forty-five miles an hour; but appellant contends that appellee's injuries, if any, were caused by the driver Harris with whom appellee was riding, proceeding to cross the intersection without giving appellant's car, proceeding on the right, the right of way. It is not contended that any negligence on the part of Harris can be imputed to appellee, and even if the driver Harris were negligent it would not be a defense to this suit on the part of appellant. But appellant contends that appellee was guilty of contributory negligence. Appellee testified that they passed the Dodge car just before they got to the intersection of Sherman and Williams streets and that the Harris car got out a little past the center of the intersection and that he saw the Studebaker car right on them and that it was turning to the left and was going to hit them. Appellee further testified that as he approached Sherman street he looked in both directions and saw no car coming; that the view to the south was obstructed by a house standing on the corner, which was back only about ten feet from the street line, and that there were trees in front of the house so that one could not get a clear view of the street to the south until he was within the intersection. There is testimony on the part of appellant in the record that appellant's car was traveling at the rate of forty-five miles an hour or sixty-six feet a second when it was one

hundred feet south of the intersection. Harris was driving the Haynes car at ten to fifteen miles an hour or about seventeen to eighteen feet a second while his car was crossing the intersection. Contributory negligence cannot be assigned as error upon this testimony. The question of contributory negligence is a question for the jury whenever there is any testimony tending to show due care. As the court said in **Dukeman v. C. C. & St. L. R. R. Co.**, 237 Ill. 107: "A failure to look and listen cannot be said to be negligence as a matter of law, since there may be many circumstances excusing such failure. (**Chicago and Northwestern Railway Co. v. Hansen**, 166 Ill. 623; **Chicago and Alton Railroad Co., v. Pearson**, 184 id. 386; **Elgin, Joliet and Eastern Railway Co. v. Lawlor**, 229 id. 621.) The deceased had a right to presume that appellant would not run its train in violation of the ordinance of the city, and contributory negligence could not be imputed to her for a failure to anticipate that appellant would approach this crossing at a rate of speed prohibited by the ordinance."

It is the duty of a mere passenger in a vehicle where he has an opportunity to learn of danger and avoid it, to warn the driver of the vehicle of such danger. (**Pienta v. Chicago City Ry. Co.** 284 Ill. 259; **Greenstreet v. T. & S. F. Ry. Co.**, 234 Ill. App. 339); but it is for the jury to determine from all the evidence, facts and circumstances in each individual case whether the plaintiff has been guilty of negligent acts which to any degree were the proximate cause of his injury. In the view of the court the verdict of the jury on the question of contributory negligence is not manifestly against the weight of the evidence. Neither was it error on the part of the court to sustain objections on cross-examination of appellee as to what he said to Harris, the driver,

at the time of the collision. Appellee testified that he did not see appellant's car until it was right upon them and had not testified to making any statement at that time. It would have thrown no light upon appellee's exercise of due care to have elicited from him a statement that he had said nothing at that particular time and the record already showed that fact.

Error is assigned because the court refused to admit in evidence, on behalf of appellant, a photograph taken by a witness for appellant, the camera being placed 35 feet west of the line of Sherman street and nine feet north of the south curb of Williams street, the lens pointed southeast. Under the statement of appellant and the proofs as then admitted, the view taken did not correspond with the situation as shown at the time of the injury when, under the proofs, a Dodge car occupied this area, and otherwise it was not shown that the conditions were the same. There was no error in the court's ruling. (*Chicago & Alton R. R. Co. v. Corson*, 198 Ill. 98; *C. & E. I. R. R. Co. v. Crose*, 214 id. 609.) Appellant was permitted to show that a person standing at the point in question could look southeast and see an object 117 feet south of the south line of Williams' street.

It is contended by appellant that the testimony does not show that appellee's ailments were the proximate result of the injury complained of. Appellee was in a hospital six weeks and suffered two operations. The attending physician fully described appellee's condition following the accident and the nature of his external abrasions and internal troubles. One of the operations was for plastic appendicitis, in which the bowels had grown fast to the abdominal wall, and a second operation was required for an absolute obstruction of the bowels. This, the witness testified, was right

in the neighborhood where he received this blow. Appellee testified he had had pains in his abdomen about two weeks before the injury. The witness was asked on direct examination: "Were the services you performed there necessary services to care for his injuries and the result of his injuries?" Answer: "Yes, the boy would have died if it had not been done." The question was asked and answer given without any objection and there was no cross-examination of the witness and we must conclude that there was some evidence of injury before the jury that would warrant a verdict.

Appellant assigns error upon the giving of appellee's first and third instructions. Both are mandatory instructions and the first one requires appellee to be in the exercise of due care at the time of the injury and concludes: "Operated his automobile at a high and dangerous rate of speed and that because of said high and dangerous rate of speed the automobile which plaintiff was riding as a passenger was struck and plaintiff was injured," etc.

Instruction number three charges the jury that if they believe from the evidence "that John Cleland was riding as a passenger in the automobile of Charles Harris and that while so riding in said automobile he was in the exercise of ordinary care and caution for his own safety and that the defendant drove an automobile carelessly and negligently and struck the automobile in which plaintiff was riding and threw him to the ground and injured him as alleged in the declaration," etc. The first instruction ignores the question of due care preceding and just before the happening of the accident and that appellant's negligence was the proximate cause of the injury. The third instruction ignores

appellee's due care and caution preceding and just before the time of the accident. It is contended by appellant that these instructions ignore one of appellant's defenses, that the Haynes car and its driver's negligence was the proximate cause of appellee's injury. We cannot agree with this conclusion. It might well be that the driver of each car was negligent, and that the negligence of each contributed to the injury and in that case both drivers would be liable. That would not relieve appellant. The instructions as given were not technically correct and in a case where the testimony was closely conflicting and the right of the appellee not clear the error might be sufficient to reverse the judgment. It is held in numerous cases that where it appears from the record that substantial justice has been done and if the trivial errors that may appear were corrected and another trial ordered the result would necessarily be the same, the judgment should not be reversed, (**C. & A. R. R. Co. v. Sullivan**, Adm'x. 63 Ill. 293; **Penn. Coal Co. v. Kelly**, 156 id. 9; **Swift & Co., v. Rutowski**, 167 id. 156; **Blunt v. Kelly**, 219 Ill. App. 327.

In several instructions offered by and given for appellant the jury were fully and amply instructed as to the due care required on the part of appellee, and we cannot see where appellant could have been prejudiced by the giving of the instructions complained of.

Appellant assigns error upon the court's refusal to give certain instructions for appellant. We have examined all of said instructions and can find no error in the refusal to give the instructions pointed out.

Finding no error in the judgment of the Circuit Court of Vermilion County sufficient to warrant a reversal, that judgment is affirmed.

Affirmed.

In The
APPELLATE COURT OF ILLINOIS,
Fourth District

MARCH TERM, A. D. 1926.

242 I.A. 658

JOSEPH KENSCHKE,)
Appellee,)

-vs-)

Appeal from the
City Court of
East St. Louis,
Illinois.

J. B. MARGOLIES WHOLE-)
SALE GROCERY COMPANY,)
Appellant.)

OPINION by BOGGS, P.J.

Appellee instituted suit against appellant before a justice of the peace of St. Clair county, upon which judgment was rendered in favor of appellee for \$255 and costs of suit. Appellant appealed said cause to the city court of East St. Louis. The cause was allotted on the trial calendar for May 28th, 1925, being one of the judicial days of the May term of said court. Thereafter, the court set aside said allotment, and without reallotting said case, dismissed said appeal for want of prosecution, at appellant's costs, and awarded proce-dendo. On July 3rd of said May term of court, appellant filed its motion in writing, accompanied by affidavit, to set aside said order of dismissal and to reinstate said cause. The May term was adjourned on August 22nd, 1925, and all undisposed of motions were continued until the next term. On November 9th,

being one of the judicial days of the November term of said court, the court overruled appellant's motion to set aside the order of dismissal. To reverse said judgment, appellant prosecutes this appeal.

The affidavit filed by appellant in support of its motion to vacate said order of dismissal and to reinstate said cause states among other things: "That following the allotment of said case for the 28th day of May, and prior to said date, on to wit the 21st day of May, 1925, the wife and son of F.M. Webb, counsel for appellant, departed this life in said county; that on account of the sickness and death of the above mentioned members of the family of appellant's counsel, the court struck said cause from the trial calendar, and without reinstating the same, on June 8, 1925, at the instance of the attorney for appellee, the court dismissed said appeal; that neither appellant nor his counsel knew that said cause would be called for trial, and that they were not notified by the attorneys for appellee that they would insist on said cause being tried at said time, and that counsel for appellant did not learn that said appeal had been dismissed until June 26, and at that time an execution had been served on appellant company; that the appeal from said judgment was taken in good faith and not for delay, and that the defendant has a good and meritorious defense to a major part of the plaintiff's claim, and that the defense is that the claim of plaintiff has been paid, or a major portion thereof, and that the defendant is not indebted to the plaintiff whatever, or if indebted, the indebtedness is but small as compared with the judgment rendered by the said justice of the peace."

No brief was filed by appellee, and under the rules of this court, we would be warranted in reversing said judgment pro forma. However, we have deemed best to consider the case on the merits.

A trial court may, during the term at which a judgment

is rendered, set the same aside for good cause shown. Atchison, T. & S. F. R. Co. v. Elder, 149 Ill. 173-181. A motion to vacate a judgment entered during the term at which it was rendered, if not disposed of, may be continued to a subsequent term and then allowed. Windett v. Hamilton, 50 Ill. 180-188; Hibbard v. Mueller, 86 Ill. 256-257; Goodykoontz v. Kelly, 135 App. 165.

While a party, in order to have a default set aside, must show a meritorious defense to the claim on which judgment is rendered, and that he has used due diligence in prosecuting his defense, still if the affidavit filed in support of a motion to open up a judgment shows a meritorious defense, and that the defendant has not been guilty of laches, the judgment should be set aside. Mason v. McNamara, 57 Ill. 274-277; Hoffman v. Burris, 210 Ill. 587-591; Smith v. Schoch, 135 App. 550-553.

We hold that the affidavit filed by appellant in support of its motion to set aside the order dismissing said appeal and to reinstate said cause, was sufficient, as it tended to show a meritorious defense to a part of appellee's claim, and also shows that appellant and its counsel were not guilty of laches in prosecuting appellant's defense. The court therefore erred in refusing to vacate said order of dismissal and to reinstate said cause.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

Abstract

Term No. 16

Aranda No. 19

In The
APPELLATE COURT OF ILLINOIS,
Fourth District

MARCH TERM, A. D. 1928.

242 I.A. 658

RHODES-BURFORD FURNITURE CO.,)	
Appellant,	(Appeal from the
-vs-	(City Court of
HERMAN HANSON,	(East St. Louis.
Appellee.)	

OPINION by BOGGS, P.J.

This suit was before us on a prior appeal, and an opinion was filed January 26th, 1928, reversing the same.

The second count of the declaration is in the same condition as it was when here on the former appeal. In the first count, the words "wickedly, wrongfully and maliciously and without probable cause," were eliminated. Aside from that, it is practically the same as the second count. The charge in the declaration is that prior to April 7th, 1921, appellee was in the employ of the Pioneer Box Company, and was earning \$24.00 per week; that on said appellant maliciously and without probable cause sued out an attachment against him and caused his employer to be served as garnishee, and that the case was finally decided in favor of appellee. Appellee charged among other things that by reason of said suit, he lost his employment with said Pioneer Box Company, and was unable to secure other work and was greatly

damaged in that regard. Upon the trial, a verdict was returned finding the issues in favor of appellee and assessing his damages at \$300.00. Judgment was rendered on said verdict; to reverse which judgment this appeal is prosecuted.

It is first contended by appellant that the evidence fails to support the charge of a malicious prosecution.

We held on the former appeal, 337 App. 471, at page 472:

"We find no evidence in the record that proves or tends to prove the averments of the declaration that appellant sued out the attachment with malice and without probable cause. Proof of the fact that the attachment suit was finally decided in favor of appellee is not sufficient of itself, to prove malice or a want of probable cause. Israel v. Brooks, 23 Ill. 575; Glenn v. Lawrence, 230 Ill. 531."

There being no substantial change in the evidence in this connection, we adhere to our former holding on this issue.

It is also contended that the court erred in giving appellee's third instruction. This instruction, among other things, told the jury:

"In case you believe from a preponderance of the evidence that the plaintiff lost his employment with the Pioneer Box Co., and that in case you should further believe from the evidence that the defendant or any of its managers or agents were instrumental in bringing about and proximately caused such loss of employment to the plaintiff, then and in that event, and in addition to the above elements of damages, if any, the jury have a right to take into consideration the reasonable value to the plaintiff of such employment, if any, shown by the evidence; and you should allow the plaintiff such sum of money which the jury may believe will fairly compensate the plaintiff for damages he has sustained therefor."

Under the holding of this court on the former trial, and

the cases cited therein, the court erred in giving this instruction, for the reason, among other things, that it allowed the jury to take into consideration in fixing the amount of appellee's damages, if they should find for him, the value to the plaintiff of the employment which he had with the Pioneer Box Company.

In discussing this question, this court on the former trial said: "The court instructed the jury at the request of appellee that if they believed from the evidence that he lost his employment by reason of the issuing of the attachment, they should allow him such damages on account thereof as were shown by the evidence.

"Damages, to be recoverable, must be the natural and reasonable result of the defendant's act. He cannot be held responsible for injuries which could not reasonably have been foreseen or expected as a result of his misconduct. Phillips v. Dickerson, 35 Ill. 11; Braun v. Craven, 175 Ill. 401. In a case of this kind, the damages must be the direct, natural and proximate result of the former suit. 26 Cyc. 63. No damages which are merely remote consequences of the defendant's conduct are recoverable. 19 Am. & Eng. Encyc. of Law, 702."

There is no evidence in the record to the effect that the Pioneer Box Company discharged appellee on account of the garnishment suit, other than the conclusion of appellee himself. Harry F. Burton, a witness on behalf of appellant, testified that he was the superintendent of the Pioneer Box Company, that he knew appellee in April, 1921, and had known him a couple of months; that he had occasion to discharge appellee from his employment; that he discharged him for cheating on his bonus; that his work had not been satisfactory up to that time, and when he caught him cheating on his bonus, he discharged him. He further testified: "I did not discharge Herman Hanson on his having been garnished and his wages attached in the suit of Rhodes-Burnford Furn. Co. against him. I did not discharge him for any other

reason than that which I have stated." Appellee, however, denied having so cheated. The record discloses that appellee continued in the employment of the Pioneer Box Company for some two months after the attachment suit complained of was brought.

We held on the former appeal, and now hold that even though it be conceded that appellee was discharged on account of the attachment suit, the evidence fails to show that that suit was wrongfully brought. The record discloses that appellee owed for the victrola that he had purchased, and that the attachment suit was brought to collect therefor.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

Abstract

Term No. 22

Agenda No. 16

In The
APPELLATE COURT OF ILLINOIS,
Fourth District

MARCH TERM, A. D. 1926.

242 I.A. 658

SARAH V. GRISSOM,
Appellee.

-vs-

THE GRAND LODGE BROTHER-
HOOD OF RAILROAD TRAIN-
MEN,
Appellant.

Appeal from the
City Court of
East St. Louis, Illinois.

OPINION by BOGGS, P. J.

An action in assumpsit was instituted by appellee against appellant in the city court of East St. Louis, upon a benefit certificate issued to Charles E. Grissom, son of appellee, in which certificate appellee was named as beneficiary. The insured died September 6th, 1920, and payment was refused by appellant company.

The declaration was in the usual form. To it appellant filed the general issue and certain special pleas. By leave of court these special pleas were afterward withdrawn, and one additional special plea was filed. In and by said special plea, appellant set out in hæc verba sections 42 and 44 of its constitution, being as follows:

"Sec. 42. The charter of any subordinate lodge may be suspended or revoked by the President of the Grand Lodge for any

of the following reasons: Improper conduct; refusing or neglecting to conform to the Constitution and General Rules and Regulations of the Brotherhood, neglecting or refusing to make its returns and reports; for neglecting to hold at least two regular meetings each month; unless prevented by unavoidable causes; for refusing or neglecting to install a successor to any officer removed by the President; for neglecting or refusing to bring an officer or member to trial when directed to do so by the President; or for failing to impose the penalties provided for by the Constitution on members convicted of any misdemeanor or for resorting to or obtaining an injunction or restraining order for the purpose of defeating the legal action of the Grand Lodge, a subordinate lodge or a legally constituted committee of the Brotherhood, but the charter shall not be suspended for any of the foregoing reasons until the lodge has been notified, and an opportunity given to answer charges made against it, the charter shall be suspended or revoked as the President may determine.

"Sec. 44. A member of a defunct lodge may be granted a dispensation to join some other lodge upon application to the President of the Grand Lodge. Such dispensation shall be treated the same as a card of withdrawal when presented to a lodge for admission. The President of the Grand Lodge shall be authorized at his discretion, to transfer a member of a defunct lodge, who was in good standing up to the time such lodge became defunct to a lodge having proper jurisdiction provided application for such transfer is made within thirty days from the date on which the lodge became defunct."

Said plea also set forth in haec verba General Rule No. 11, as follows:

"No. 11. Any members or member inciting a strike or participating therein, except as provided in General Rule No. 10, shall upon conviction thereof be expelled. The lodge under whose jurisdiction an unauthorized strike occurs shall within ten days

thereafter cause charges to be preferred against any and all members engaged in such strike. While under charges for engaging in an unauthorized strike, no member shall be granted a traveling, transfer or withdrawal card. If within ten days the lodge does not cause charges to be preferred against members engaged in the unauthorized strike, the charter of the lodge may be revoked by the President of the Grand Lodge who may transfer to other lodges the members not participating in such strike."

Certain other sections were set forth, but it will not be necessary to quote them here. Said plea also set forth that on April 8th, 1920, the insured engaged in an unauthorized strike in violation of said General Rule 11, and that on April 8th, 1920, the President of appellant caused a written notice to be served on the officers of More Shade Lodge No. 706, being the lodge to which the insured belonged, stating that the members of said lodge were participating in an unauthorized strike, and that unless charges were preferred against those taking part in the strike, and the guilty ones punished, the charter of the lodge would be revoked.

Said plea further averred that the President of appellant Grand Lodge, on April 20th, 1920, mailed a letter to the officers of said More Shade Lodge No. 706, notifying them that the charter of said lodge had been revoked by the President as of 4 P. M., April 20th, 1920, for violation of said General Rule No. 11; that thereafter, on April 23rd, 1920, the President of said Grand Lodge sent notices to all members of More Shade Lodge No. 706, to the effect that the charter of said lodge had been revoked, but that "if they had not participated in said illegal strike, their members might be transferred to some other lodge as provided by said section 44 of said Constitution; that the insured never made any application to be transferred to another lodge, and that his monthly dues were refused by appellant after May 1st, 1920.

To said plea appellee filed a general demurrer, which said demurrer was sustained by the court, and appellant electing to abide its plea, judgment was rendered on said demurrer. A jury was empaneled to assess the plaintiff's damages, and on motion of appellee the court directed a verdict in her favor for \$2,504.00. Judgment was rendered thereon for said amount and costs. To reverse said judgment, this appeal is prosecuted.

In Hatch v. Grand Lodge, B. of E. T., 233 App. 495, being a suit for recovery on a benefit certificate issued by appellant Grand Lodge, we held that a member of said lodge cannot be expelled for a violation of General Rule No. 11 of appellant's constitution, unless he has been tried and convicted, and that expulsion must be proven by the records of the lodge, it being a corporate body. (Citing: Sup. Lodge, Ancient Order of United Workmen v. Zuhlke, 129 Ill. 293; Ind. Ord. Foresters v. Zach, 136 Ill. 184.)

While the plea in this case avers that appellant notified More Shade Lodge No. 706 that certain members of said lodge were engaged in an illegal strike, and that unless "charges were preferred against those taking part in said strike, and the guilty ones punished," the charter would be revoked, this does not amount to a preferring of charges against said subordinate lodge. Under the provisions of General Rule No. 11, said subordinate lodge had ten days in which to prefer charges against any members participating in said illegal strike. That time not having elapsed, and holding as we do that the notice so sent to the subordinate lodge did not amount to a preferring of charges, the Grand Lodge was not in a position to forfeit the charter of More Shade Lodge No. 706.

Said plea also sets forth section 69 of appellant's constitution, to the effect that "five members in good standing shall constitute a quorum and shall be qualified to transact the legal business of the lodge," and then alleges among other things that the president of More Shade Lodge No. 706 duly called and endeavor-



ored to conduct a meeting of said lodge on April 10th, 1920, for the purpose of considering and preferring charges against members participating in said unauthorized strike, and that Charles E. Grissom prevented the holding of said meeting; that out of a membership of 320 in More Shade Lodge No. 706, all but three participated in said strike, and continued so to do, and that there never was a time after April 8th, 1925, when a meeting of said More Shade Lodge No. 706 could be held, for the reason that all of the members excepting the three members referred to had abandoned and deserted their membership in said lodge.

It is the contention of counsel for appellant that inasmuch as it is averred there were not sufficient members left in said subordinate lodge to constitute a quorum and to hold a meeting to try its members for joining in said unauthorized strike, the Grand Lodge was not required to prefer charges against said subordinate lodge before forfeiting its charter.

We hold that this point is not well taken. Unless the charter of More Shade Lodge No. 706 was lawfully revoked by the President of the Grand Lodge, no valid ground of forfeiture was shown. It was not for the President to arbitrarily revoke ~~the~~ *said* charter ~~of said subordinate lodge~~. Its charter could only be revoked in the manner specified in its constitution. Hatch v. Grand Lodge, 233 App. 495-498.

It would therefore follow, as Grissom was not expelled by the subordinate lodge to which he belonged, before appellant could refuse payment of said certificate it must have forfeited the charter of said subordinate lodge in the manner specified in the constitution of the Grand Lodge. This was not done.

The court did not err in sustaining a demurrer to said plea, and as there is no contention that the judgment is not for the right amount, if appellee is entitled to recover, it is accordingly affirmed.

abstract
Judgment affirmed.

154-211

STATE OF ILLINOIS.

APPELLATE COURT

4TH. DISTRICT.

MARCH TERM, A. D. 1926.

TERM NO. 20.

AG. NO. 20.

242 I.A. 658

ESTHER SANDERS, Admx. etc.,	:	
Appellee,	:	APPEAL FROM
	:	
VS.	:	FRANKLIN
	:	
UNITED STATES FUEL CO.,	:	CIRCUIT COURT.
Appellant.	:	

Barry, J. - Appellant operates a coal mine about two miles east of Benton, Illinois. Its tipple and washer are located about a thousand feet north of the public highway running east and west. A switch track extends south from the tipple across the highway to the switch yards just south thereof. Railroad cars are loaded with coal at the mine and are moved by gravity to the yards. On December 8, 1923, appellee's intestate was riding in a Ford car driven by one Cecil Gray upon the said highway going east. At the same time a servant of appellant was riding the north end of a car of coal as it moved by gravity toward the crossing of the switch and highway. A collision occurred at the crossing which resulted in the death of the occupants of the Ford car.

The amended third count of the declaration charged that for more than two years prior to the collision appellant had maintained an electric bell at said crossing which would ring continuously when a loaded car was being moved south upon the switch track toward the crossing; that deceased was familiar with this

1875. 1876. 1877.

fact; that on the day in question appellant carelessly and negligently failed to cause said bell to ring when the car of coal was approaching said highway crossing from the north; that deceased was then and there in the exercise of due care and caution for his own safety while approaching the said crossing in an automobile upon said highway, and that by reason of appellant's negligence aforesaid was struck and killed by said car of coal. There were two other counts in the declaration but it is unnecessary to set them out. Issues were joined and the trial resulted in a verdict and judgment for \$5,000.00.

Appellant contends that the court erred in refusing to direct a verdict in its favor because the record is barren of proof of due care upon the part of the deceased or the driver of the Ford car prior to and at the time of the collision. There was evidence fairly tending to show that for about two years prior to the accident appellant had maintained an electric bell at the crossing which would ring continuously when a car of coal was moved south on the switch over the crossing, and that this fact was well known to deceased; that on the day in question the bell was out of order and did not ring. The jury had a right to consider whether deceased relied upon appellant's automatic signal device, and it was for them to say whether he was guilty of contributory negligence, Bross vs. Chicago Great Western Railroad Co., 171 N.W. (Iowa) 149.

A court can never be called upon to say to the jury that contributory negligence has been established as a matter of law, unless the conduct of the injured party has been so clearly and palpably negligent that all reasonable minds would so pronounce it without hesitation or dissent. If the case is open to difference of opinion, the jury must pass upon it,

L.S. & M.S. RY. Co. vs. Johnson, 135 Ill. 641. There is evidence tending to show that it appeared as if both cars slackened speed as if they might be going to stop before reaching the crossing. In the state of the proof we cannot say that the court erred in refusing to hold as a matter of law that deceased was guilty of contributory negligence.

It is argued that appellant was not guilty of any negligence which proximately caused the accident. Where electric bells are placed at a railroad crossing to signal approaching trains, the failure of the bells to ring is evidence of negligence on the part of the railroad company, Hicks vs. M.Y.N.H. & H.R.R. Co. 41 N.E., (Mass.) 721. The question of appellant's negligence ^{the} was one of fact to be determined by ~~x~~/jury.

It is argued that the court erred in refusing appellant's 13th and 14th instructions. They were to the effect that the jury should find appellant not guilty as charged in the first and second counts of the declaration. It is urged that these instructions should have been given because of a variance. One desiring to insist on a variance between the allegations and the proof must make the objection when the evidence is offered and point out the variance specifically to enable the other party to amend, Dorn vs. Bissell, 180 Ill. 73. There is no showing that such an objection was made by appellant. Even if the first and second counts of the declaration were not proven, the refusal to direct a verdict as to them was not reversible error if the evidence was sufficient to support the third amended count, there being nothing to show that the jury based their verdict on the first or second count, Klofski vs. Railroad Supply Co., 235 Ill. 146. In an action ex delicto, if the plaintiff proves enough of the material allegations of the declaration to make out a cause of action he is entitled to recover, notwithstanding

there were other averments of the declaration which the evidence does not sustain, Postal Telegraph-Cable Co., vs. Likes, 225 Ill. 249.

There was evidence fairly tending to prove the third amended count of the declaration, and for that reason the court did not err in refusing to direct a verdict as to that count. It is finally argued that the court erred in refusing appellant's 11th instruction which reads as follows: "The Court instructs the jury as a matter of law, that a railroad crossing is a place of danger and that one approaching a railroad crossing is not entitled to omit due care and caution for his own safety, or to rely wholly on warning being given him by a bell or otherwise of the approach of a train, but that he must exercise all proper acts of vigilance, under the circumstances to insure his own safety".

The concluding clause of the instruction, - "but that he must exercise all proper acts of vigilance under the circumstances to insure his own safety," is clearly erroneous. The deceased was not required to be so vigilant as to insure his own safety. The law required him to exercise ordinary care and caution for his own safety and nothing more. Finding no reversible error, the judgment is affirmed.

Abstract

AFFIRMED.



5450a

STATE OF ILLINOIS.

APPELLATE COURT

4TH. DISTRICT.

MARCH TERM, A. D. 1926.

TERM NO. 56.

19. 3. 26.

242 I.A. 658

NETTIE SIMS,	:	
Appellee,	:	APPEAL FROM
	:	
V.	:	CITY COURT OF
	:	
HUDSON INSURANCE CO.,	:	EAST ST. LOUIS.
Appellant.	:	

Barry, J. - On August 26, 1924, appellant insured appellee's household goods for one thousand (\$1,000.00) dollars for one year against loss or damage by fire. Appellee sued to recover on the policy averring that the property was entirely consumed and destroyed by fire on October 29, 1924; that she immediately notified appellant of the fire and upon its special request in writing after 60 days from the date of the fire she furnished proof of loss and by reason thereof appellant waived her failure to furnish the same within 60 days from the date of the fire, etc. Appellant pleaded the general issue and four special pleas, the first of which charged that appellee, with fraudulent intent, wilfully burned her property. The second, that she falsely and fraudulently represented that she was the owner of household goods in ten (10) rooms of the value of two thousand (\$2,000.00) dollars. The third, that she was not the ^{the} conditional and sole owner of the property.

The fourth, that in her proofs of loss she falsely and fraudulently swore that she was the owner of the property therein described. Issues were joined and a trial resulted in a verdict and judgment for one thousand (\$1,000.00) dollars.

Appellant contends that the court should have directed a verdict in its favor because the proof of loss not having been offered in evidence there was no proof that it contained the information required by the terms of the policy. The undisputed evidence is that proof of loss was furnished appellant, and at the trial it was marked as appellant's exhibit No. 1. Two witnesses testified that proof of loss was furnished appellant but it was not offered in evidence. This was a sufficient showing that proof of loss was furnished, Hartford Fire Ins. Co. vs. Walsh, 54 Ill. 164; Continental Life Ins. Co. vs. Rogers, 119 Ill. 474. It further appears that appellant retained the proof of loss without making objection thereto. That being true it cannot, when sued on the policy, question the sufficiency thereof, Continental Life Ins. Co. vs. Rogers, supra. It is too late to raise upon the trial, for the first time, the adequacy of the proof of loss, Ill. O.M.A. vs. Besterfield, 37 App. 522.

It is argued that the evidence shows that appellee falsely and fraudulently represented that she was the owner of ten (10) rooms of furniture whereas the furniture in three of the rooms was the property of Mrs. Duggan. There was a conflict in the evidence as to that matter. Both Mrs. Duggan and appellee claimed to have purchased the furniture in the three rooms from the same party but neither side called that person as a witness. Under proper instructions the jury found that issue in favor of appellee and we would not be warranted in disturbing their finding in that regard.

It is argued that appellee was not the sole and unconditional owner of a part of the furniture. It is contended that

Mrs. Duggan owned a portion of it and that even if it were owned by appellee the evidence shows that she had not paid the full purchase price. There was a conflict in the evidence as to whether Mrs. Duggan owned a portion of the property and the jury having found that issue in favor of appellee, the fact that she had not paid the full purchase price was no evidence that she was not the sole and unconditional owner thereof.

Appellant contends that some of the property was damaged but not destroyed and that as to such property the proper measure of damages was the difference in value before and after the fire; that no such proof was offered and that the verdict is excessive. Appellant permitted appellee to testify, without objection, that all of the property insured was destroyed by fire and at the time of the fire it was of the value of \$1300.00. There was a conflict in the evidence as to the amount of the loss and we are not prepared to say that the verdict is so manifestly against the weight of the evidence that it should not be permitted to stand.

We are not impressed with the contention that under the averment that the property was destroyed by fire no recovery could be had for that portion of it that was destroyed by smoke and water incident to the fire. At any rate the most that can be said is that there was a variance between the proof and the averment of the declaration. If appellant desired to insist on a variance it should have objected when the evidence was offered and should have pointed out the variance specifically so as to enable the other party to amend, Dorn vs. Bissell, 180 Ill. 73.

Appellant insists that the court committed reversible error in refusing its 8th instruction to the effect that the jury should consider all the facts and circumstances in evidence, and having done so they might find any fact to be proven which they believe may be rightly and reasonably inferred from the evidence although there may be no direct evidence as to such fact. In

its first special plea appellant charged appellee with the commission of a crime, - the wilful burning of her property to defraud. It was, therefore, necessary for her to prove that charge beyond all reasonable doubt, Foster vs. Graf, 287 Ill. 559. One cannot be convicted of crime, rightfully, on circumstantial evidence alone, unless the facts and circumstances proven establish his guilt beyond all reasonable doubt. The court did not err in refusing appellants eighth instruction.

It is finally argued that the court should have granted a new trial on the ground of newly discovered evidence to the effect that on July 1, 2 or 3 , 1924, appellee stated to Anna Sparks that she was hard pressed for money and that if she did not receive aid of some kind in a short time that she intended to burn her property to obtain money from the Insurance Company. So far as the record shows it does not appear that appellee had any insurance on her property prior to August 26, 1924 when the policy in question was issued. The newly discovered evidence was also cumulative in character. The court did not err in its ruling in that regard.

Finding no reversible error in the record the judgment is affirmed.

Abstract

AFFIRMED.

5154a

STATE OF ILLINOIS.
APPELLATE COURT
4TH. DISTRICT.

MARCH TERM, A. D. 1926.

242 I.A. 659

TERM NO. 41.

AG. NO. 52.

BESSIE GILBERT,	:	
Appellee,	:	APPEAL FROM
	:	
VS.	:	EAST ST. LOUIS
	:	
ILLINOIS CENTRAL	:	CITY COURT.
RAILROAD CO.,	:	
Appellant.	:	

Barry, J. - Appellee was employed in Mr. Beck's restaurant which was located upon land rented by him from appellant. Appellant had a stub-switch the western terminus of which was but a few feet distant from the rear end of the kitchen of the restaurant. To keep its cars from leaving the switch track appellant had placed two ties on top of the rails to which they were fastened. On November 4, 1925, at about two o'clock P.M. two or three cars were standing on the switch not far from the wheel-block and appellant's servants shoved a cut of 38 or 40 cars in on the switch against the standing cars with such force as to drive the westerly car over the block, through a small coal shed, and the bumper thereof entered the rear door of the kitchen. When the crash came appellee was at work in the kitchen where there was a lighted oil stove and several gallons of gasoline were stored. In attempting to escape she struck a corner of one of the counters and sustained an injury in her groin and hip which caused ovarian hemorrhages. When the cars were shoved in on the switch appellant's servants

were well aware of the situation and had no one within eight hundred or one thousand feet of the west end of the cut to signal the engineer who was operating the engine.

It seems to us that a mere statement of the facts is sufficient to show that appellant was guilty of negligence. The first count of the declaration charged that the crash caused divers parts of the building to strike and injure appellee. That count was not proven and it is urged that the Court erred in refusing to withdraw it from the consideration of the jury. While that is true, yet such an erroneous ruling is not reversible error if there is evidence fairly tending to support some other count that states a cause of action, as a plaintiff is not required to prove each count of the declaration, *Scott vs. Parlin & Orendorff Co.*, 245 Ill. 460.

The first count charged ordinary negligence, while the others averred willful and wanton negligence. It is not claimed that any of the counts failed to state a cause of action but it is insisted that the Court erred in refusing to direct a verdict because there was no proof of willful and wanton negligence. Under the facts aforesaid, which are undisputed, we would not be warranted in holding, as a matter of law, that there is no evidence fairly tending to support the charge. That being true it was for the jury to determine whether appellant was guilty of willful and wanton negligence and the Court did not err in refusing to direct a verdict, *Brown vs. Ill. Terminal Co.*, 319 Ill. 326. Nor would we be warranted in holding that the verdict is manifestly against the weight of the evidence.

It is argued that even if appellant was guilty of the negligence charged, yet it was not the proximate cause of appellee's injuries; that her injuries were not the natural and probable consequences of such negligence. We cannot agree with that contention. When a person has been put in sudden peril by the negligent act of another, and, in an instinctive effort to escape from

that peril, suffers an injury, the negligent act is the proximate cause of the injury, and it is immaterial that under different circumstances he might, and ought to have seen and avoided the latter danger, 22 R.J.L. 145. The Court did not err in the admission or exclusion of evidence.

It is finally contended that the Court erred in giving appellee's second instruction to the effect that if she had proven her case by a preponderance of the evidence she was entitled to recover. It is said that the instruction is erroneous because it did not tell the jury what her case consisted of. It has been held that if the declaration in an action for negligence is sufficient, it is not error to give an instruction to the effect that if the plaintiff has made out a case as alleged in the declaration the jury should find the defendant guilty, but such practice is not approved, Mc Farland vs. Chicago City Ry. Co., 288 Ill. 476. In Collins vs. Missouri-Illinois R.R. Co., 235 App. 545, we held that the giving of such an instruction was not reversible error and the Supreme Court denied certiorari and thereby approved our conclusions in that regard, Soden vs. Olney, 269 Ill. 98.

No reversible error having been pointed out, the judgment is affirmed.

Abstract

AFFIRMED.

Source: [illegible] reference

15-1284

Term No. 7.

Agenda No. 3.

In the Appellate Court
of Illinois.
Fourth District.

March Term, A. D. 1926.

The People of the State of
Illinois, for the use of
Esther S. Hanmann,
Appellee,

vs.

Albert Sturman,
Appellant.

242 I.A. 659

Appeal from the
County Court of
Clinton.

OPINION BY HIGGINS, J.

On trial before a jury in the County Court of Clinton County, appellant Albert Sturman was found guilty on a charge of bastardy preferred against him by Esther S. Hanmann, appellee. A judgment was entered upon the verdict from which this appeal has been perfected. Appellee was the sole witness who testified in her behalf. She swore that about 9 o'clock one evening, on or about June 12, 1924, she and a girl friend of hers Geneva Rohmann while walking along South Locust street in the City of Centralia were invited by appellant and a young man accompanying him, to take a ride in an automobile; that she did not know the young man with appellant and that at the time they were approached by the young men said to her friend "that is the Sturman boy driving the car"; Appellee further testified that the four of them drove out some distance on the hardroad from Centralia and there turned off on a byroad, she riding with appellant and her friend with the other young man; that her friend after the car stopped got out and started to walk back toward Centralia, and that the young man with her followed; that when the other parties left the car appellant committed a rape upon her and that was the only time there were any improper relations between them. She testified that her friend returned to the car in about a half hour, and that they returned

to Centralia; that she rode back in the front seat of the car with the unknown companion of appellant, and her friend rode in the back seat with appellant. Appellant denied the statements testified to by her and swore he never was with her at any time. He testified that on the evening of June 12, 1924, he left Centralia about 8 o'clock with his wife, sister-in-law and mother-in-law, and drove to Katoka and did not return to Centralia until about 10 o'clock. In this he was corroborated by his sister-in-law and mother-in-law.

The child in question was born on March 5, 1925 and Dr. Julius P. Missell who attended appellee at that time, testified that she told him one Ed Reinhart was the father of her child, but that the next day, when he again called upon appellee, she told him that she had lied to him, and that appellant was the father of the child. Appellant placed a number of witnesses on the stand who testified that his reputation as a moral and chaste citizen was good. Appellee's friend, Miss Hohmann, who was with her on the evening in question was also called as a witness in behalf of appellant. She testified on direct examination that she did not know either of the young men with whom she and appellee were riding on the evening in question, but that appellant was not one of them; that when the car stopped she got out and started to walk back to Centralia because of remarks made to her by the young man with whom she was riding in the back seat; that she was persuaded to return to the car and ride back to Centralia, and that she rode back in the front seat, with the young man with whom appellee had ridden out, and that it was not appellant. She further testified that appellee did not say to her at the time they were invited to ride, that it was the sturman boy driving the car. On cross examination she testified that she did not know the boy she rode back with; that she did not ride back with Al Sturman; that she did not know Sturman at that time. She was then asked "you do not know if it was Sturman or not" and answered "No I don't". Later she testified "neither of the young men in the car with us that night was the defendant here".

The only testimony in behalf of appellee was her own. This was flatly denied by appellant. The testimony of appellant's sister-in-law and mother-in-law and of appellee's friend who was with her on the evening in question as well as the testimony of the attending physician tends strongly to contradict her and corroborate appellant.

It was incumbent on appellee to establish her charge of bastardy by a preponderance of the evidence. In our opinion she failed to meet that requirement and the verdict in this case was clearly against the weight of the evidence. Under such circumstances it is the duty of this court to reverse the judgment. (People v. Angert 202 Ill. App. 299; People vs. Cutler 200 id. 469; People v. Trowley 185 id. 258; Madison v. The People 122 id. 66 and Maciel v. The People 55 id. 452.)

Complaint is made of remarks of the trial judge uttered on the hearing of this cause. We are of the opinion that the remarks in question while not of such a serious character that standing alone they would require a reversal of this judgment, yet some of them would at least tend to impress the jury that portions of the evidence offered and admitted were of no importance and this was improper. The judgment will be reversed and cause remanded.

REVERSED AND REMANDED.

Abstract

Postcard

MARCH TERM, A. D. 1926.

Walter Liese, an Individual,
doing business under the name and
style of Liese Lumber Company,
Original Petitioner; George W.
Reinhardt, John Howard Heiner,
Elizabeth Heiner and the Mascoutah
Building and Loan Association,
Defendants to the Original Petition,
and William Weis, Intervenor,
Appellees.

vs.

Barthel Hug, Intervenor,
Appellant.

242 I.A. 659

APPEAL FROM

ST. CLAIR.

OPINION BY HIGBEE. *J.*

This suit was originally instituted by a petition to foreclose a mechanics lien filed by Walter Liese, doing business under the name and style of Liese Lumber Company, against George W. Reinhardt, a contractor, Howard Heiner and Elizabeth Heiner, owners of the property involved and Mascoutah Building and Loan Association, mortgagee. The petition alleged that Howard and Elizabeth Heiner were the owners of Lot five in E. W. West's Second Addition to the City of Belleville, Illinois, as joint tenants, on and prior to July 5, 1923; that the petitioner furnished material to said Reinhardt for a dwelling which the latter had contracted with the Heiners to build on the premises in question; That the last delivery of materials for said building was made by *him* ~~them~~ on October 19, 1923; and prayed for the foreclosure of a mechanic's lien for the balance due him for such material in the sum of \$969.69. The contractor Reinhardt answered the petition admitting the contract with the owners and also the contract with petitioner for materials but denying that the last delivery of material was made October 19, 1923, *and* ~~but~~ averring that it was made during September 1923.

Howard and Elizabeth Heiner filed an answer to the petition admitting the ownership of the property, and that prior to July 5, 1923 that they

0-0-1-342

THE SECRETARY OF THE
TREASURY
WASHINGTON, D. C.
JANUARY 1, 1914

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AND CORRECT COPY OF THE
ORIGINAL AS SUBMITTED
TO THE SECRETARY OF THE
TREASURY FOR RECORD
AND PRESERVATION
JANUARY 1, 1914

[Signature]

THE SECRETARY OF THE
TREASURY

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contracted with Reinhardt for the erection of a dwelling house but averring that they had paid the contractor in full. The answer further denied that Leise furnished all the material for the dwelling house and averred that whatever material he did furnish was delivered long prior to October 19, 1923. The answer further denied that Leise served any notice on them or either of them within sixty days after the date of the last delivery of material and further denied that they were indebted to Leise, but stated that they fully paid Reinhardt before receiving any notice that Leise claimed anything was due him for material furnished.

One William Weis intervened seeking to establish a lien for materials furnished by him on the same contract in the sum of \$549.58. Appellant Barthel Hug also intervened seeking to establish a claim in his behalf for materials furnished under the same contract in the sum of \$797.95 alleging in his intervening petition that the last material he delivered under his contract with the contractor was on December 5, 1923. The decree entered by the court found that neither Leise, Weis nor Hug were entitled to any lien against the premises involved. Barthel Hug perfected this appeal from the decree. Leise filed an appeal bond but did not file any transcript. He has however assigned cross errors in this appeal by said Hug.

The Court found in its decree that the proof did not show any valid notice of service upon the owners by appellant Hug, and that his suit was not commenced within four months from the date of the last delivery of material, as required by section 33 of the Mechanic's Lien Act.

Appellant Hug filed his intervening petition on April 22, 1924 which contained the expressed allegation that the last material he furnished was delivered on December 5, 1923, but the decree found that the last delivery was made prior to October 19, 1923. Appellee John Howard Heiner testified that they went into the occupancy of the dwelling on the 19th of October, 1923 and that the "whole thing" was finished during the month of October.

Appellant himself testified ~~that~~ when first on the stand that he could not say when the material was delivered. His son Edward W. Hug

testified that the last material "must have been" delivered two or three days before the 5th day of December 1923. Another son Arthur Hug who was bookkeeper for appellant stated that all the items were entered on the books on December 5, 1923, but that he did not know when the articles were delivered. At a subsequent hearing appellant testified that appellees later claimed that an art glass window had not been delivered as contracted for, and that he delivered this window about January 3, 1924. The court found in its decree that appellant Hugg had not established any date on which a last delivery of material was made, but that such delivery was prior to October 19, 1923. If this finding is correct appellant Hug did not file his petition within four months from the date of the last delivery of material and therefore the court was correct in holding that his lien had not been established. We are not inclined to disturb the trial court's finding that appellant had not established the delivery of material within four months prior to the filing of his intervening petition especially so, in view of the fact, his petition alleged that the last material was delivered December 5, 1923, and this allegation therein was never amended. (Millard vs. Millard 221 Ill. 86. If the suit was not begun within four months from the date of the last delivery of material the question of the sufficiency of the notice served by appellant is not material.

Leise assigned cross errors to the effect that the court erred in not decreeing him a lien for the amount claimed. The court found that Leise was not entitled to a lien for the reason that the notices which he had served upon appellee were insufficient because of the description of the property therein. The property involved was lot number 5 in E. W. West's Second Addition to the city of Belleville, Illinois. In the notices served by Leise the property was described as 511 East C Street, Belleville, Illinois, county of St. Clair, Illinois. It is probably true that this description in itself was insufficient. However, the proof shows the property at 511 East C. Street is the same as the lot 5 involved, which in our opinion makes this notice sufficient so far as description of property is concerned. No question has been raised as

to the propriety of the assignment of cross error by Leise in this case. Assuming that each assignment of cross errors is proper and that the notices were sufficient so far as the description is concerned, yet the proof shows that the property was owned by John Howard Heiner and Elizabeth Heiner as joint tenants and not as tenants in common, and that the notice was served only upon Howard Heiner. This court in *Leise v. Heintz* 240 Ill. App. 275 held that a notice served upon one of the two joint tenants for a mechanic's lien would not subject the interest of the other joint tenant to such lien, therefore the interest of Elizabeth Heiner was not subject to the lien of Leise. However under the doctrine enunciated in that case the interest of Howard Heiner would be subject thereto.

Accordingly the decree of the trial court will be reversed and the cause remanded, with directions to that court to enter a decree awarding Walter Leise, an individual doing business under the name and style of Leise Lumber Company, a mechanic's lien on the interest of John Howard Heiner in the premises involved for the sum of Nine Hundred sixty-nine Dollars and sixty-nine cents, with interest at the rate of five per cent per annum from October 19, 1923.

REVERSED AND REMANDED WITH DIRECTIONS.

Abstract

7-5-12

Term No.23.

Agenda No.27.

APPELLATE COURT,

FOURTH DISTRICT.

MARCH TERM, A.D.1926.

5457a

THOMAS F.JACKSON,
Appellee

v.

THE FIDELITY and CASUALTY

COMPANY of NEW YORK,
Appellant.

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242 I.A. 659

Appeal from City Court of EAST ST.
LOUIS.

Opinion by Higbee, J.

---oOo---

This is an appeal from a judgment of the City court of East St.Louis, upon the verdict of a jury in favor of appellee Thomas F.Jackson and against appellant the Fidelity and Casualty Company of New York, in the sum of \$793.50.

The suit was an action in assumpsit based on a policy issued by appellant to appellee insuring him against loss by robbery. Appellee was engaged in the sale of gasoline and automobile accessories in the city of East St.Louis and it was claimed by him that on March 25, 1926 about 8:30 P.M. he was held up by two men and robbed of \$793.50 of which \$700 was taken from his person and \$93.50 from his cash register. The policy contained this provision among others, "The Company shall not be liable for any loss....(h) unless books and accounts are kept by the assured and the loss can be accurately determined therefrom by the company." Appellee testified that a day or two before the robbery he drew \$600 from the bank and on the evening in question had taken \$100 from the cash register and placed it with this \$600.00; that the \$100.00 which he drew from the cash register and the \$93.50 taken therefrom by the robbers represented his receipts which had not been placed in the bank.

Counsel for appellant contend that the testimony¹ clearly shows that no books of account or records of the transactions at

appellee's filling station were kept from which it could be determined that \$193.50 was taken by appellee on the day of the robbery or the day before or during the week before or during the month before; there is no testimony or any record that would justify the conclusion that \$600 had been received by appellee in the course of business managed by him at the filling station that was deposited in the bank and afterwards withdrawn, and which he says he had on his person at the time of the robbery!" The abstract shows that appellee offered in evidence 14 exhibits, and that exhibits 3 and 14 both inclusive, with the possible exception of exhibit 13, were books or records tending to show his receipts. A considerable portion of appellant's argument is devoted to the discussion of what these exhibits show. Upon appellee's offer of his exhibit 3, the abstract shows, that one of the attorneys for appellant stated to the court "I want to cross examine on these before the court passes on the offer". The abstract also shows that upon the offer by appellee of his exhibit 9 the same attorney for appellant again stated "we are reserving our objections to all these offers." These are the only objections shown by the abstract to have been made by appellant to the introduction of appellee's exhibits, with the exception of an objection made to the admission of certain books offered by appellee referred to as "credit memoranda" and to these the court sustained the objection. These exhibits are not abstracted and the record does not disclose that any further objections were made to their admission or that the court ever ruled upon any of the objections thereto except the objections to the "credit memoranda". While it is not incumbent upon this court to do so we have searched the bill of exceptions and the entire record and these exhibits are not contained therein. Appellant in no way refers to or accounts for their absence.

It was the duty of appellant to furnish a complete abstract fully presenting every error and exception relied upon necessary to present the case to this court, without any inspection of the record.. (Douglas v. Miller, 102 Ill.App.345 ; Dunscomb v.

Patterson.101 Ill.App.69; Home "arden of America v.Holt,108 Ill. App.578.) Appellee in his argument states that he "introduced in evidence 12 different books in which his business transactions were recorded;..... that none of these exhibits are abstracted except by a very brief reference and none of them copies in the bill of exceptions and they are not a part of the record in this case." We have failed to find where these exhibits are even briefly abstracted. The only thing found in the abstract concerning them is appellee's testimony as to what they were and what they showed. Without doubt a provision in a burglary or robbery policy requiring books and accounts to be kept by the assured from which the loss can be accurately determined,such as the one herein question is valid,and it is a question of fact whether or not appellee had complied with that provision. However ~~with~~^{there is} nothing before us to show what these exhibits were and the record is in such condition that it is uncertain whether any objection was ever offered to their introduction. This court is therefore in a position to pass upon either ~~and~~ the question of whether the evidence shows a compliance with said provision of the policy or the further question whether the exhibits were properly admissible in evidence.

It is also a matter of complaint by appellant that attorney for appellee persisted in the cross examination of one of appellants witnesses in asking in substance what record the witness would expect appellee to make of the robbery,"what sort of a record he would get from the robber"..The court however sustained objections to these questions and we are of the opinion that while the questions were frivolous,yet the mere fact that they were asked,did not constitute reversible error. It is also contended by appellant that the closing argument of counsel was highly prejudicial and constituted reversible error.. Only one sentence of appellee's attorneys argument is set out in the abstract and to this statement the court sustained an objection and directed the jury to disregard it. While the statement made by ^{counsel for} appellee was improper,yet as the court promptly directed the jury to disregard

it. we do not feel that it alone constituted such error as to demand a reversal of the judgment, and the same will accordingly be affirmed.

Judgment Affirmed.

Abstract

Appellate Court
Fourth District
March Term, A. D. 1926.

West Frankfort Bank and Trust
Company,

Appellee.

vs.

Lee Chapman and Elma Chapman,
Appellants.

54288
242 I.A. 659
APPEAL FROM THE CIRCUIT COURT
OF FRANKLIN COUNTY.

OPINION BY HIGBEE, J.

On November 8th, 1924, Appellee, the West Frankfort Bank and Trust Company, obtained a judgment by confession upon a promissory note, with warrant of attorney attached, in the Circuit Court of Franklin County, Illinois, against appellants Lee Chapman and Elma Chapman for the sum of \$468.32.

On December 15th, 1924, a petition to vacate the judgment and for leave to plead to the declaration was filed by the said Elma Chapman upon the grounds that she did not sign the note upon which the judgment was entered. The judgment was afterwards vacated as to said Elma Chapman; and by agreement between the parties a trial was had before a jury of five on July 1st, 1925. The jury found the issues in favor of the plaintiff and assessed the damages against defendant for the sum above mentioned. Judgment having been entered upon the verdict, an appeal was prayed by the said Elma Chapman.

Upon the trial of the cause, the following stipulation was entered into. "It is hereby agreed and stipulated by the parties in this suit that Lee Chapman signed the note in question, and that there is now due and unpaid on said note to the plaintiff, West Frankfort Bank and Trust Company, the sum of four hundred sixty-eight dollars and thirty-two cents (\$468.32), and that the only question at litigation in this suit, being as to the signature of Elma Chapman, as set out in the bill. The sole question being as to whether Elma Chapman signed the note and warrant of attorney thereto attached or whether or not she authorized any person to sign said note for her or that she assumed any liability upon said note by authorization or ratification, is the

only question to be litigated in this suit".

It appeared from the proof that the said Lee Chapman and Elma Chapman were at the time of the transaction in question husband and wife; that on February 7th, 1923, the said Lee Chapman opened an account with Appellee by making a deposit of \$111.60 and from time to time made deposits up to May 4th, 1923, amounting to the sum of \$575.60. On May 16th, 1923, he borrowed of Appellee the sum of \$200.00 giving his note due in sixty days upon which appears the name of the said Elma Chapman, as surety. Some two weeks later, he borrowed \$200.00 more in the same way. On the 7th, day of July, 1923 these two notes were combined in one for the sum of \$400.00 and on September 7th, this note was renewed. It would also appear, although the evidence on this question is somewhat uncertain, that on September 13, 1923 there was still another note given for \$400.00. All these notes bore the name of Appellant Elma Chapman, in addition to that of the said Lee Chapman. The note sued on, in this case, was the one bearing date September 7, 1923, which fell due on the 7th, day of November following. After the note became due, Appellee's cashier wrote, as he testified, letters addressed to each of the parties purporting to sign the note. It is clear from the proof that Elma Chapman never signed any of these notes and in fact it is not contended by Appellee that she did.. The letter above referred to as addressed to her was the first notice she had that her name was in any way connected with the note. After receiving this notice, she went to the Bank of Appellee where she had a conversation with its Vice President in regard to the matter and told him that she had neither signed the note herself nor authorized Mr. Chapman to sign it. She testified that she also told him at that time that she would not pay the note. Later, on March 20th, 1924, she went to Appellee's Bank and paid the interest on the note amounting to \$11.67 for the reason she testified, that Mr. Chapman ordered her to do so; that "she paid the interest under his instruction". She further testified that at that time, Mr. Heard, Appellee's Cashier, took out a new note and asked her to sign it, but that she refused to do so, saying, "I will pay just the interest".

Mr. Heard testified that when the note sued on became due, Mrs. Chapman offered to borrow money enough of Appellee on some real estate she had, to pay off this \$400.00 note and some debts around town, the total amount she wanted to borrow being from \$1500.00 to \$2000.00 but that he refused to make the loan. It appears that in June, 1924, after Mrs. Chapman had paid the interest on the note, she secured a divorce from Mr. Chapman. Judgment was not taken upon the note by confession until about a year it became due.

Among the errors assigned by the Appellant are that the trial court erred in giving the jury erroneous instruction on behalf of Appellee. There were four of these instructions, all of which apparently were improperly given. The first instruction given for Appellee was as follows: "The Court instructs the jury that if they believe from the preponderance of the evidence that prior to and up to the time of the execution of the note sued on that the said Elma Chapman had voluntarily and knowingly held the said Lee Chapman out to the plaintiff as authorized to sign her name to the note in question or similar notes, or that she would be bound by his signing her name to notes as surety for him when borrowing money from the plaintiff, and had knowingly so conducted herself to reasonably justify the plaintiff in believing that the said Lee Chapman did have her authority to so sign her name as surety to said note and the plaintiff accepted such note in good faith, believing that the said Lee Chapman did have the authority to sign the name of said Elma Chapman thereto, then the Court instruct the jury as a matter of law that Elma Chapman would be bound by the act of Lee Chapman signing her name to said note, and your verdict should be for the plaintiff.

The objection made by Appellant to this instruction is that there is no evidence to support it. She testified that she knew nothing at all about this note and had not authorized her name to be signed to it and this statement of hers is not contradicted or disputed in the proof. Neither was there any conduct of hers proven or offered to be proved, showing that the plaintiff had so conducted herself as to cause belief that her husband had authority to sign her name as surety to the note.

The second instruction informed the jury, as a matter of law, that long acquiescence by a principal in an act done by an agent beyond his powers, without objection at the time, and which may be inferred from the silence of the principal when informed of the true facts and circumstances, will amount to a conclusive presumption of the ratification of such act even though such act were not authorized at the time of the execution thereof. This instruction states an abstract proposition of law and there was no proof in this case whatever that appellant, Elma Chapman had acquiesced in the signing of her name to any note or notes by her husband, nor that she was silent when she learned that her name was signed to the note in question.

On the contrary, the proof was that as soon as she learned that her name had been so used, she denied that she had given her husband authority to so use it and said she did not sign the note and knew nothing of it. The case at best was a very close one upon the proof, therefore demanded accurate instructions as to the law, and in our opinion, the two instructions above named were erroneous and misleading, because there was no evidence in the case upon which to base them. Instructions must always be based upon the evidence. (Reinback vs. Crabtree 77 Ill. 182; Belt Ry. Co. vs. Confrey 209 Ill. 344; Kauffman vs. Helmick 212 App. 10)

For the error in giving these two instructions, the judgment of the Court below will be reversed and the cause remanded.

REVERSED AND REMANDED.

not to be reported.

Abstract

Term No. 27.

Agenda No. 12.

Appellate Court

Fourth District

March Term, A. D. 1926.

2421 A. 660

Pioneer Building and Loan
Association, a Corporation,
Appellee,)

vs.)

W. O. Hall, N. M. Hall, East
Side Lumber Company, A. C.
Stiritz and S. S. Luckian,
Appellants.)

Appeal from
County Court of
Williamson.

OPINIONS BY HIGBEE, J.,

This is an appeal from a judgment for \$540.00 entered by the County Court of Williamson County against appellants W. O. Hall, N. M. Hall, East Side Lumber Company, A. C. Stiritz and S. S. Luckian ~~and~~ in favor of appellee, Pioneer Building and Loan Association. The action was based upon a bond given to appellee by appellants, and one C. L. McClintock to secure the payment to appellee by appellant W. O. Hall of fifty monthly payments of \$36.00 each.

The record is incomplete and in confusion. It would seem however, that the original declaration was filed on November 18, 1925, and that on the 15th day of December following, appellants filed a plea in abatement to which a demurrer filed thereto on the 21st of December, was sustained. It then seems that appellants on the 21st of December filed a demurrer to the declaration which was confessed by appellee and leave taken to file an amended declaration which was filed on December 23, 1925.

No rule appears to have been taken upon appellants to plead or demur to this amended declaration which was again amended on December 22, 1925 and the record does not show that any default was taken against them. The record does show that judgment was entered against appellants by default on the 19th day of December 1925 or four days before the amended declaration was filed. If this is true the judgment was premature. The declaration on file at the date of the judgment and to which the demurrer

had been sustained was clearly insufficient to support the judgment. One of the errors assigned is that the declaration is not sufficient to support the judgment.

This court must be bound by what the record shows, and must therefore hold that as the judgment was rendered before the amended declaration was filed and without any default against appellants upon such amended declaration and without any rule on appellants to plead or demur to the same. The judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

*Not to be
reported in full*

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